FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS AND ORDERS

JULY 1, 1986 TO DECEMBER 31, 1986

PUBLISHED BY THE COMMISSION

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JULY 1, 1986 TO DECEMBER 31, 1986

DANIEL OLIVER, *Chairman*
Took oath of office April 21, 1986

PATRICIA P. BAILEY, *Commissioner*
Took oath of office October 29, 1979

TERRY CALVANI, *Commissioner*
Took oath of office November 18, 1983

MARY L. AZCUENAGA, *Commissioner*
Took oath of office November 27, 1984.

ANDREW J. STRENIO, JR., *Commissioner*
Took oath of office March 17, 1986.

EMILY H. ROCK, *Secretary*
Appointed April 17, 1983

CONTENTS

	Page
Members of the Commission	II
Table of Cases	V
Findings, Opinions and Orders	1
Advisory Opinion (*Phosphate Rock Export Association*	397
Table of Commodities	409
Index	411

TABLE OF CASES

Unless otherwise indicated in parentheses, the names below refer to cases in which orders to cease and desist have been entered by the Commission. The names in *italics* refer to cases which the Commission has dismissed.

Dkt. No.	Name	Page
C-3193	American Academy of Optometry, Inc.	25
9189	Arnold Jerome Cadillac, Inc.	249
9189	Audette Cadillac, Inc.	249
9178	Bass Brothers Enterprises, Inc., et al.	51
8922	Beneficial Corporation, et al. (Modifying Order)	168
8922	Beneficial Management Corporation (Modifying Order)	168
9189	Bill Snethkamp, Inc.	243
9189	Birmingham Chrysler-Plymouth, Inc.	243
C-3195	Blue Lustre Home Care Products, Inc.	41
9197	Brog, Roy	18
9189	Buff Whelan Chevrolet, Inc.	193
9174	Chappell & Co., Inc.	112
9189	Charles Dalgleish Cadillac-Peugeot, Inc.	249
9189	Chrysler-Plymouth Dealers Association of Greater Detroit, Inc.	243
C-3203	Cosmo Communications Corporation	255
9189	Crissman Cadillac, Inc.	249
9189	Detroit Auto Dealers Association, Inc., et al. (Interlocutory Order)	55
9189	Detroit Auto Dealers Association, Inc., et al. (Cadillac)	249
9189	Detroit Auto Dealers Association, Inc., et al. (Chevrolet)	193
9189	Detroit Auto Dealers Association, Inc., et al. (Chrysler-Plymouth)	243
9189	Dexter Chevrolet Co.	193
9189	Dick Genthe Chevrolet, Inc.	193
9189	Dreisbach & Sons Cadillac Co.	249
9189	Ed Rinke Chevrolet-GMC Co.	193
9201	Electronic Systems International, Inc., et al.	148
9202	Electro Tech Manufacturing, Inc., et al.	6
C-3202	GCS Electronics, Inc., et al.	158
C-837	General Railway Signal Co., et al. (Modifying Order)	181
9189	George Matick Chevrolet, Inc.	193
9189	Greater Detroit Chevrolet Dealers Association, Inc.	193

		Page
C-3198	Independent Insurance Agents and Brokers of California, Inc.	93
C-3199	Independent Insurance Agents Association of Montana, Inc.	99
C-3197	Independent Insurance Agents of America, Inc.	87
C-2929	Interco Incorporated, et al. (Modifying Order)	133
9189	Jack Cauley Chevrolet, Inc.	193
C-2037	J.B. Williams Company, Inc., et al., The (Modifying Order)	56
9189	Jefferson Chevrolet Co.	193
C-3194	Lithium Corporation of America	33
9189	Les Stanford Chevrolet, Inc.	193
9189	Lochmoor Chrysler-Plymouth, Inc.	243
C-2929	Londontown Corporation (Modifying Order)	133
9189	Lou LaRiche Chevrolet-Subaru, Inc.	193
9189	Mark Chevrolet, Inc.	193
9189	Matthews-Hargreaves Chevrolet Co.	193
C-3201	Max Factor & Co.	135
9189	Merollis Chevrolet Sales & Service, Inc.	193
9189	Metro Detroit Cadillac Dealers Association, Inc.	249
C-3192	Michigan Watchmakers' Guild, Inc.	1
9189	Mike Savoie Chevrolet, Inc.	193
C-3200	North Carolina Orthopaedic Association, The	116
9176	Orkin Exterminating Company, Inc. (Interlocutory Order)	147
9176	Orkin Exterminating Company, Inc.	263
9203	Pittsburgh Penn Oil Company, et al.	123
9174	Polygram Records, Inc., et al.	112
C-2929	Queen Casuals, Inc. (Modifying Order)	133
9189	Roger Rinke Cadillac Co.	249
9189	Roseville Chrysler-Plymouth, Inc.	243
9172	Roswil, Inc., trading and doing business as Ramey Super Markets	174
C-3196	Saga International, Inc.	62
9189	Shelby Oil Company, Inc., doing business as Monicatti Chrysler-Plymouth Sales	243
9178	Sid Richardson Carbon & Gasoline Co.	51

		Page
9189	Tennyson Chevrolet, Inc.	193
9189	Thompson Chrysler-Plymouth, Inc.	243
C-2902	Union Carbide Corporation (Modifying Order)	184
8835	United Brands Company (Set Aside Order)	40
C-3204	Viobin Corporation	385
9189	Walt Lazar Chevrolet, Inc.	193
9174	Warner Bros. Records, Inc.	105
9174	Warner Communications, Inc., et al.	105
9189	Westborn Chrysler-Plymouth, Inc.	243
9189	Wink Chevrolet Co.	193

IN THE MATTER OF

MICHIGAN WATCHMAKERS' GUILD, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3192. Complaint, July 1, 1986–Decision, July 1, 1986

This consent order requires, among other things, a Royal Oak, Mich. trade association to not take any future action to fix or maintain prices or establish suggested prices for cleaning or repair services for watches, clocks, or jewelry.

Appearances

For the Commission: *Seth B. Zimmerman, Johnathan Ferguson* and *Peter R. Reilly.*

For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Michigan Watchmakers' Guild, Inc., hereinafter sometimes referred to as respondent or "the Guild," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

1. Respondent, Michigan Watchmakers' Guild, Inc., is a corporation organized, existing and doing business under the laws of the State of Michigan, with its principal office located at 1202 Catalpa Drive, Royal Oak, Michigan.

2. The Guild, which was incorporated in 1970, is a trade association of approximately 200 members. A majority of the Guild's members are located in Wayne, Oakland, and Macomb Counties in the southeast portion of Michigan. Members of respondent are engaged in the

business of cleaning and repairing watches, clocks, and jewelry for a fee.

3. Except to the extent that competition has been restrained as alleged herein, respondent's members compete among themselves and with other watchmakers.

4. Consumers spend substantial sums each year on the services of respondent's members.

5. Respondent engages in substantial activities which further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

6. In the course and conduct of its business, respondent has distributed printed copies of suggested minimum price lists for cleaning and repairing watches, clocks, and jewelry through the United States Postal Service in interstate commerce. In addition, respondent's members conduct business in interstate commerce. The acts and practices herein alleged are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

7. Respondent has acted as a combination of its members, or in conspiracy with at least some of its members, to restrain price competition among watchmakers in Michigan and increase or maintain the price of cleaning and repairing watches, clocks, and jewelry by establishing and distributing suggested minimum price levels.

8. In furtherance of the aforesaid combination or conspiracy, respondent has held annual general meetings at which suggested minimum prices are determined by a majority vote of all present. In this manner, respondent determines suggested minimums both for the prices that retail watchmakers charge consumers and for the prices that "tradeshop" repair firms charge retail watchmakers. Respondent then prepares and distributes suggested minimum price lists for (1) retail watch cleaning and repair; (2) quartz/digital retail watch cleaning and repair; (3) tradeshop watch cleaning and repair; (4) clock cleaning and repair; (5) grandfather clock cleaning and repair; and (6) retail jewelry cleaning and repair.

9. The purpose or effect and the tendency and capacity of the combination or conspiracy described above has been to restrain price competition and increase or maintain the price of cleaning and repairing watches, clocks, and jewelry.

10. The combination or conspiracy described above constitutes an unfair method of competition and an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The combination or conspiracy, or the effects thereof, are continuing and will continue absent the entry of an order against respondent.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Michigan Watchmakers' Guild, Inc. (hereinafter "Guild"), is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 1202 Catalpa Drive, Royal Oak, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent Michigan Watchmakers' Guild, Inc., a corporation, its successors and assigns, and respondent's officers, directors, agents, representatives, and employees, directly or indirectly, through any corporation, subsidiary, affiliate, committee, division

or other device, in connection with the conduct of its business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Taking any action the purpose or effect of which is to fix, maintain, stabilize, or increase the price of cleaning or repair services for watches, clocks, or jewelry;

B. Adopting or disseminating suggested prices for the cleaning or repairing of watches, clocks, or jewelry, *provided,* that nothing in this order prohibits the collection or dissemination of information regarding past cleaning or repair prices, so long as such information is aggregated before dissemination in such a way that neither the identity of the parties providing the underlying information nor information relating to specific transactions is disclosed or otherwise reasonably ascertainable.

II.

It is further ordered, That:

A. Within 45 days after this order becomes final, the Guild shall mail to each of its members a copy of this order and a letter in the form shown as Appendix A to this order.

B. For a period of two (2) years after the date of service of this order, the Guild shall also provide a copy of this order and a letter in the form shown as Appendix A hereto to:

1. Each new Guild member at the time the member is accepted into membership; and

2. Each person who makes a request for suggested minimum price lists.

III.

It is further ordered, That, for a period of three (3) years following the effective date of this order, the Guild shall maintain in its files a copy of the minutes of each meeting of its membership and of each meeting of its board of directors and a copy of all correspondence relating to prices for the cleaning or repairing of watches, clocks, and jewelry, and that such copies of minutes and correspondence be made available for inspection by representatives of the Federal Trade Commission upon written request.

IV.

It is further ordered, That, within sixty (60) days after service of this order, respondent shall file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission may, by written notice to respondent, require.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in it, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

APPENDIX A

(Respondent's Letterhead)

Dear

As you may be aware, the Federal Trade Commission (FTC) has investigated our practice of annually publishing suggested minimum cleaning and repair prices for watches, clocks, and jewelry.

In all the years we have done our surveys, it was never drawn to our attention that the issuance of such lists is considered illegal. However, under U.S. Supreme Court rulings, the manner in which we have conducted our price surveys could be shown to be an attempt to control prices which, if proven true, would be a violation of the Federal Trade Commission Act.

Therefore, in order to avoid lengthy and costly litigation with the FTC, we have voluntarily entered into an agreement with the Commission which resulted in the issuance by the Commission of a Complaint and the entry of a Consent Order. The Order requires that you be sent a copy of the Order and this letter.

Under the terms of the FTC's Order, the Guild is required to refrain from taking any action whose purpose or effect is to fix, maintain, stabilize, or increase the price of cleaning or repair services for watches, clocks, or jewelry. The Guild is also required to cease and desist from publishing suggested cleaning or repair prices for watches, clocks, and jewelry, but the Order does not prohibit the Guild from publishing statistical information on historical prices.

The agreement is for settlement purposes only and does not constitute an admission by the Guild that the law has been violated as alleged in the Complaint.

A copy of the Order is enclosed.

Yours truly,

Marx E. Cooper
President

Enclosure

IN THE MATTER OF

ELECTRO TECH MANUFACTURING, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9202. Complaint, Nov. 1, 1985—Decision, July 9, 1986

This consent order requires a Norcross, Ga. manufacturer and marketer of home energy controlling devices, and its corporate officer, among other things, to cease making claims of energy savings associated with the product "The Energy Computer", or any other energy-control device, without competent and reliable substantiation. Additionally, respondents are prohibited from representing that consumers are eligible for a federal income tax credit with the purchase of their products, unless that is true.

Appearances

For the Commission: *Michael Dershowitz* and *Sandra N. Hammer.*

For the respondents: *Joseph A. Carragher, Jr.,* Norcross, Ga.

COMPLAINT

The Federal Trade Commission, having reason to believe that Electro Tech Manufacturing, Inc., a corporation, and Donald Raposo, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Electro Tech Manufacturing, Inc. is a Georgia corporation with its principal office and place of business at 7001 Peachtree Industrial Boulevard, Norcross, Georgia.

(b) Donald Raposo is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporation.

(c) Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents manufacture, advertise, offer for sale, sell and distribute energy control devices for residential or small commercial use.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. In advertisements, respondents have made various statements about the energy savings capability of their energy control devices sold under the brand name "The Energy Computer." Typical and illustrative of these statements, but not all-inclusive thereof, are the following from the advertisements attached hereto as Exhibits A and B:

You'll SAVE 20% on your heating and air conditioning energy bills.

The Energy Computer will . . . save you at least 20% in energy costs.

You realize actual savings, up to 20%, 35%, and even more in some instances.

Pays for itself in less than 2 years.

Qualified for energy tax credits.

PAR. 5. Through the use of the above statements, and other statements in advertisements not specifically set forth herein, respondents have made the following material representations, directly or by implication:

(1) Use of The Energy Computer energy control device will save consumers at least 20% and possibly, as much as 35% or more on their annual small commercial or home heating and cooling bills.

(2) It will take less than two years for consumers to save enough money on their small commercial or home heating and cooling bills by using The Energy Computer energy control device to recoup the retail cost of The Energy Computer.

(3) The Energy Computer is a qualified energy conservation product according to the U.S. Tax Code, thereby permitting purchasers of the product to obtain a tax credit and reduce their federal income tax liability.

PAR. 6. In truth and in fact:

(1) Consumers will not save 20%, or close to 20%, on their annual small commercial or home heating and cooling bills as a result of using The Energy Computer energy control device.

(2) Few, if any, consumers will save enough money on their small commercial or home heating and cooling bills by using The Energy Computer energy control device to recoup the retail cost of The Energy Computer within two years, or close to two years.

(3) The Energy Computer is not a qualified energy conservation product according to the U.S. Tax Code. Therefore, purchasers of The Energy Computer cannot obtain a tax credit or reduce their federal income tax liability by purchasing the product.

Therefore, the representations set forth in Paragraph Five were, and are, false and misleading.

PAR. 7. Through the use of the statements set forth in Paragraph Four, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time of making the representations set forth in Paragraph Five, they possessed and relied upon a reasonable basis for those representations.

PAR. 8. In truth and in fact, at the time of the initial dissemination of the representations and each subsequent dissemination, respondents did not possess and rely upon a reasonable basis for making those representations because, *inter alia,* respondents' test protocols and calculations were not designed or conducted in a manner to produce competent, reliable and statistically meaningful results. Therefore, respondents' representations, as set forth in Paragraph Seven, were, and are, false and misleading.

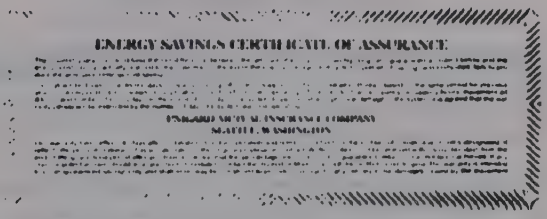
PAR. 9. The acts or practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

EXHIBIT A

THE ENERGY COMPUTER IS...

- A deductible business expense.
- Qualified for energy tax credits.
- A factor in increasing the resale value of your residence or building.

THIS...


ENERGY SAVINGS CERTIFICATE OF ASSURANCE

THE NEWS
FTC forms clearinghouse on energy-saving claims

THE UNIGARD INSURANCE POLICY

False, misleading, exaggerated claims in energy savings. You've heard them and so has Uncle Sam. So much so that the federal government has had to set up a policing agency! We're all for that. Because The Energy Computer will always do for you what it promises to – save you at least 20% in energy costs. That's not a claim. It's a fact. The Unigard Mutual Insurance Company guarantees it. And The Energy Computer has it!

AND THIS...

THE ENERGY COMPUTER

Because The Energy Computer is a *true* computer -- the only one designed for residences and small commercial buildings -- it provides you many advantages. The second most important is the money you save on oil, gas or electric bills. What's the first most important? *Comfort.* The Energy Computer cuts your costs without cutting your comfort. No "too hot" or "too cold" setback periods. No uncomfortable "cycle off" settings.

HERE'S HOW IT WORKS...

Exhibit "A"

WE JUST DON'T CLAIM YOU'LL

SAVE 20%

ON YOUR HEATING AND AIR CONDITIONING ENERGY BILLS

WE GUARANTEE IT!

WITH...

OTHER FEATURES THAT ADD TO YOUR COMFORT

- Power failure delay. Protects your compressor with an automatic four-minute delay. Also protects against thermostat misuse by children.
- Fail-safe function. In the event of any malfunction, your heating/cooling system will operate normally and safely.
- Hot water heater control capability. Has built-in adjustable controls to duty-cycle your hot water heater for additional efficiency (optional installation required).

PAYS FOR ITSELF IN LESS THAN 2 YEARS.

FIGURE IT OUT FOR

If Your Monthly Heating and Air Conditioning Bill Is... Your 20%

$ 85	
$100	
$115	
$130	
$145	
$160	
$175	
$190	
$205	

INSTALLED IN 29 MINUTES

Installation is easy and convenient. Our factory-trained electrical contractor installs The Energy Computer in a fast 29 minutes. (Or, to demonstrate exactly how it works, he'll connect it up temporarily in an even faster ten minutes!) Measuring only 8¾ inches high by 6½ inches wide by 1½ inches deep, it's installed at the furnace or air handler, between the thermostat and the devices that the thermostat controls: heat relay, air conditioning relay, fan. 100% user satisfaction guaranteed for one year. Warranty for three years on parts.

EXHIBIT B

At last!
a computerized energy management system that is a "thinker" . . . not just a timer.

INTRODUCING!
THE ENERGY COMPUTER T.M.

Providing you with:

Continuous Comfort.

No more too-hot or too-cold "set-back" periods. And no more uncomfortable "cycle-off" settings. Comfort is *not* sacrificed.

Actual Savings in Energy Costs.

The efficiency of your central heating/cooling system is increased 24 hours each day. You realize *actual* savings, up to 20%, 35%, and even more in some instances. And your savings are not endangered or nullified by "time-of-day" or "demand" billing now being practiced in many utility districts.

Computer based "Continuous Search" Program.

The "secret" of the Energy Computer's advanced effectiveness over timers, set-back thermostats, or cycle selection devices. This amazing capability is explained more fully on the following page.

Many Outstanding Features, including:

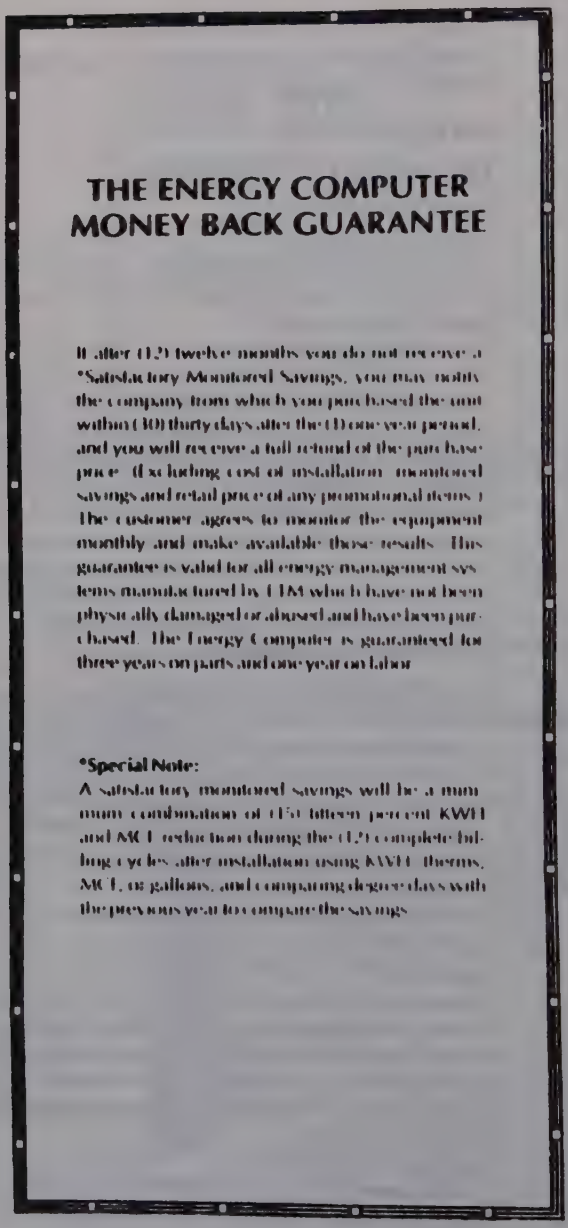
- *Power failure delay.* Protects your compressor with an automatic 4 minute delay. (also protects against thermostat misuse.)
- *Fail-Safe.* In the event of any malfunction, your heating/cooling system will operate normally.
- *Hot-water heater control capability.* Has built-in adjustable controls to duty-cycle your hot-water heater for additional efficiency. (Optional installation required.)

Installation.

The Energy Computer operates in series with your existing thermostat, on any applicable 24 volt transformer circuit. The installation and operation manual provided makes it an easy, 30 minute job. No high-voltage dangers. No interference with warranties on your present system.

Guaranteed Satisfaction.

100% user-satisfaction guarantee for a full year. Conditioned only by product misuse or abuse.



THE ENERGY COMPUTER MONEY BACK GUARANTEE

If after (12) twelve months you do not receive a *Satisfactory Monitored Savings, you may notify the company from which you purchased the unit within (30) thirty days after the (1) one year period, and you will receive a full refund of the purchase price (Excluding cost of installation, monitored savings and retail price of any promotional items.) The customer agrees to monitor the equipment monthly and make available those results. This guarantee is valid for all energy management systems manufactured by EMS which have not been physically damaged or abused and have been purchased. The Energy Computer is guaranteed for three years on parts and one year on labor.

*Special Note:

A satisfactory monitored savings will be a minimum combination of (15) fifteen percent KWH and MCF reduction during the (12) complete billing cycles after installation using KWH, therms, MCF, or gallons, and comparing degree days with the previous year to compute the savings.

Exhibit "B"

Continuous Search Program

All things considered . . .

Many factors affect your energy efficiency:

- Coefficient between inside and outside temperatures (Insulation, etc.)
- Volume of uncirculated heated or cooled air in duct work
- Amount of residual heating or cooling in furnace or coil
- Volume of heated or cooled air in unoccupied rooms
- Thermostat inefficiency (demand range beyond comfort settings

The Energy Computer is able to "consider" all these factors, many of which are constantly changing. It is a programmed system, capable of a continuous search and test pattern, testing-setting-retesting-resetting, an endless combination of energy out put and fan run-on possibilities.

A minimum of % test setting combinations!

The Energy Computer is constantly searching for the most efficient energy conserving cycle. For example, every fifteen minutes, it will reduce or increase in one minute increments the running time of your compressor or heating element. Because it stored in its memory what happened in the previous fifteen minutes, it is able to think and constantly make decisions. It is always trying to lower the running time of the compressor or heating element with additional use of fan run on time in air conditioning.

An L.E.D. display for status information.

You can constantly know the status of your system by observing the L.E.D. (light emitting diode) display. It's fun but unnecessary. This computer based system is busily testing each cycle. Keeping you comfortable. With the least energy use. At the lowest possible cost. So relax and let The Energy Computer do the "thinking."

That's why we say,

All things considered . . .

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their counsel, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Electro Tech Manufacturing, Inc. is a Georgia corporation with its principal office and place of business at 7001 Peachtree Industrial Boulevard, Norcross, Georgia.

Respondent Donald Raposo is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent. His address is 1187 Castle Way, Norcross, Georgia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

Definitions

For purposes of this order, the following definitions shall apply:

Energy-related claim means any general or specific, oral or written representation that, directly or by implication, describes or refers to

energy savings, energy cost savings, efficiency or conservation, "payback," or "payback" potential.

A *competent and reliable test* means any scientific, engineering, laboratory, or other analytical report, study or survey prepared by one or more persons with skill and expert knowledge in the field to which the material pertains and based on testing, evaluation and analytical procedures that ensure accurate, reliable and statistically meaningful results.

Small commercial heating and cooling systems are similar to residential, central forced air type systems.

Energy control device (sometimes referred to as *duty-cycler* or *cyclic controller*) means any electronic device which is not a setback thermostat, but which:

(a) functions to interrupt a thermostatically-controlled cycle of any single, residential or small commercial, forced air central heating or air conditioning unit; or which

(b) may be incorporated in any other product, such as a setback thermostat, to function in the manner described in (a) above.

PART I

It is ordered, That respondents Electro Tech Manufacturing, Inc., a corporation, its successors and assigns, and its officers, and Donald Raposo, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any energy control device or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, in any manner that:

(1) Consumers will save 20%, or close to 20%, on their annual small commercial or home heating and cooling bills as a result of using The Energy Computer, or any other such energy control device, as defined herein.

(2) More than a few consumers may be able to save enough money on their small commercial or home heating and cooling bills by using The Energy Computer to recoup the approximately $400 retail cost of The Energy Computer within two years, or close to two years.

(3) More than a few consumers may be able to save enough money on their small commercial or home heating and cooling bills by using any energy control device, as defined herein, costing approximately $400 to recoup such cost within two years, or close to two years.

(4) Consumers can obtain a federal tax credit or reduce their federal income tax liability, by purchasing The Energy Computer or any other such energy control device, as defined herein, unless such is the case.

B. Making any energy-related claim for any energy control device, or any other product or service, unless at the time that the claim is made, respondents possess and rely upon a competent and reliable test or other objective material which substantiates the claim.

PART II

It is further ordered, That respondents Electro Tech Manufacturing, Inc., a corporation, its successors and assigns, and its officers, and Donald Raposo, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any energy control device or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, for at least three years from the date of the last dissemination of energy-related claims, maintain and upon request make available to Federal Trade Commission staff for inspection and copying, copies of:

1. all materials relied upon to substantiate any energy-related claim; and
2. all test reports, studies, surveys or demonstrations in their possession that contradict, qualify, or call into question any energy-related claim.

PART III

It is further ordered, That respondents shall distribute a copy of this order to each of their operating divisions and to each of their officers, agents, representatives or employees engaged in the preparation or placement of advertisements or other sales materials, and to each of their distributors or dealers: (1) who engaged in the wholesale or retail sale of any energy control device manufactured, offered for sale, sold, or distributed by or for respondents; and (2) who purchased ten or more energy control devices from respondents.

PART IV

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the

creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

PART V

It is further ordered, That each individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment and that, for a period of three years from the date of service of this order, each individual respondent named herein shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacture, advertising, promotion, offering for sale, sale, or distribution of energy control devices and of his affiliation with any new business or employment in which his own duties and responsibilities involve the manufacture, advertising, promotion, offering for sale, sale, or distribution of energy control devices, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment.

PART VI

It is further ordered, That respondents shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order.

IN THE MATTER OF

ROY BROG

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9197. Complaint, Sept. 10, 1985—Decision, July 15, 1986

This consent order requires a former chief executive officer of a Salt Lake City, Utah manufacturer and distributor of a dry milk substitute, among other things, to cease making any representations concerning the health benefits or expected shelf life for "Meadow Fresh White", a powdered, dairy-based milk substitute, or other food products, without reliable and competent substantiation. Also, respondent is prohibited from excluding some distributors in computing "average" distributor earnings without proper disclosures concerning the method of computation.

Appearances

For the Commission: *Lawrence M. Hodapp.*

For the respondents: *B.H. Harris* and *Joseph M. Chambers, Harris, Preston, Gutke & Chambers,* Logan, Utah.

COMPLAINT

The Federal Trade Commission, having reason to believe that Roy Brog, individually and as an officer and director of Meadow Fresh Farms, Inc., ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Roy Brog is an officer and director of Meadow Fresh Farms, Inc. He formulates, directs and controls the acts and practices of said corporation, including the acts and practices alleged in this complaint. His principal office or place of business is in Salt Lake City, Utah.

PAR. 2. Respondent manufactures, offers for sale, and sells food products, including Meadow Fresh, a powdered, dairy-based drink, through a multilevel business opportunity.

PAR. 3. Respondent has caused to be prepared, published and disseminated advertising and promotional material, including, but not limited to, the promotional material referred to herein, to promote the sale of Meadow Fresh and membership in a multilevel business opportunity.

PAR. 4. The acts and practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 5. In the course and conduct of his business, respondent has disseminated and caused the dissemination of advertisements and promotional material for food products, including Meadow Fresh, and for a multilevel business opportunity involving the sale of such food products, by various means in or affecting commerce, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products and business opportunities.

PAR. 6. Typical statements in said advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are the following:

(A) Contains over twenty times less "XO"* than the whole version of the other product.

* "XO" is xanthine oxidase, a major contributor to cardivascular problems.

(B) Meadow Fresh has an expected dry shelf life of 5 to 10 years.

PAR. 7. Through the use of the statements referred to in Paragraphs Six (A) through Six (B), and other statements contained in other advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that:

(A) The use of Meadow Fresh instead of milk will reduce the incidence of cardiovascular disease due to reduced levels of xanthine oxidase.

(B) Xanthine oxidase is a major contributor to cardiovascular problems.

(C) Meadow Fresh has an expected storage life of up to 10 years under reasonable storage conditions.

PAR. 8. Through the use of the statements referred to in Paragraph Six (A) through Six (B), and other statements contained in other advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that at the time of initial dissemination of the statements and of each subsequent dissemination, he possessed and relied upon a reasonable basis for the representations set forth in Paragraphs Seven (A) through Seven (C).

PAR. 9. In truth and in fact, at no time has respondent possessed and relied upon a reasonable basis for making the representations set forth in Paragraphs Seven (A) through Seven (C). Therefore, respondent's representation as set forth in Paragraph Eight was, and is, false and misleading.

PAR. 10. In the course and conduct of his business, respondent has disseminated, as previously described, promotional flipcharts upon

which the current average monthly income of each level in the distributor hierarchy is to be entered. (A copy of this flipchart is attached to this complaint as Exhibit A.) These flipcharts are headed "CURRENT AVERAGE INCOMES FOR EACH BONUS LEVEL" and contain blanks following the terms "ADVISOR . . .; COORDINATOR . . .; MANAGER . . .; AMBASSADOR . . ." for income figures to be entered. These flipcharts have represented, and now represent, directly or by implication, that the income figures shown thereon reflect an average which is computed by taking into account the total number of distributors who have advanced to the specified bonus level and the amount of money earned by each of them during the month in question.

PAR. 11. In truth and in fact, the income figures shown on the flipcharts do not reflect an average which is computed by taking into account the total number of distributors who have advanced to the specified bonus level and the amount of money earned by each of them during the month in question. Respondent provides distributors with monthly income figures for use on the flipchart which are computed by taking into account only those distributors who earn some income during the month in question, and the total amount of money earned by them. Because the large majority of distributors earn no income during a given month, this manner of computation results in average income figures which are substantially larger than would be the case if the figures were computed by the method set forth in Paragraph Ten. Therefore, respondent's representation as set forth in Paragraph Ten was, and is, false and misleading.

PAR. 12. The acts or practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

CURRENT AVERAGE INCOMES FOR EACH BONUS LEVEL

ADVISOR ..... _____

COORDINATOR ..... _____

MANAGER ..... _____

AMBASSADOR ..... _____

NOTE: The amounts listed here only reflect rebates, overrides and bonuses, not retail profits.

EXHIBIT A

© 1982 Meadow Fresh Farms • All Rights Reserved
Contributing Author: Alan Sargent

18
ROY BROG
Complaint
EXHIBIT A
21

Decision and Order

The Federal Trade Commission having issued its complaint charging Roy Brog ("respondent") with violation of Section 5 of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complant, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Roy Brog is a former officer and director of Meadow Fresh Farms, Inc. His address is 1320 East 2300 North, Logan, Utah.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent Roy Brog, individually and as a former officer and director of Meadow Fresh Farms, Inc., and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale, or distribution of a powdered, dairy-based drink called "Meadow Fresh" or any other food product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, unless at the

time of such representation respondent possesses and relies upon reliable and competent scientific evidence that substantiates any such representation: (a) any benefit in preventing cardiovascular or other disease through the use of such product; (b) any nutritional or other health related attribute of such product; or (c) any expected shelf life of such product.

Reliable and competent shall mean for purposes of this order those tests, analyses, research, studies, or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

II.

It is further ordered, That respondent Roy Brog, individually and as a former officer and director of Meadow Fresh Farms, Inc., and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing as an "average," directly or by implication, any computation of income levels, earnings, sales or other payments received by distributors as a whole or by a specified distributor category which is based on less than all distributors in the stated category, unless the fact that some distributors are excluded and the basis for any such exclusion are clearly and prominently disclosed in close proximity to such representation.

Distributor as used in this order shall refer to any person, partnership or corporation which is granted the right to offer, sell or distribute goods or services manufactured, processed, distributed, offered or sold by respondent or to recruit other persons, partnerships or corporations to be distributors of respondent's goods or services.

III.

It is further ordered, That respondent shall, for at least three years after the date the representation is last disseminated, maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials relied upon to substantiate any representation covered by this order; and
2. All test reports, studies, surveys, or demonstrations in his posses-

sion or control, or of which he has knowledge, that contradict any representation covered by this order.

IV.

It is further ordered, That respondent shall promptly notify the Commission of the discontinuance of his present business or employment and that, for a period of four years from the date of service of this order, respondent shall promptly notify the Commission of each affiliation with a new business or employment, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment.

V.

It is further ordered, That respondent shall forthwith distribute a copy of this order to all distributors of products manufactured or marketed by respondent.

VI.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, file with the Commission a report, in a writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

AMERICAN ACADEMY OF OPTOMETRY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3193. Complaint, July 21, 1986—Decision, July 21, 1986

This consent order, among other things, prohibits a Washington, D.C.-based professional association from restricting or declaring unethical any truthful advertising, solicitation of patients or choice of a location to practice.

Appearances

For the Commission: *George R. Bellack.*

For the respondent: *John W. Hazard, Jr., Webster, Chamberlain & Bean,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent American Academy of Optometry, Inc., is a corporation formed pursuant to the laws of the District of Columbia with its mailing address at 5530 Wisconsin Avenue, N.W., Suite 950, Washington, D.C.

PAR. 2. Respondent is a professional association of optometrists. Respondent has approximately 2,700 members.

PAR. 3. Most members of respondent are engaged in the business of providing optometric health care services for a fee and selling eye-care products. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other eye care providers.

PAR. 4. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. In the conduct of their business, members of respondent

receive and treat patients from other states, receive substantial sums of money from the federal government and from other third party payers for providing optometric services and products, which monies flow across state lines, and use supplies and equipment and sell products that are shipped across state lines. The acts or practices described below are in interstate commerce, or affect the interstate activities of respondent's members, third-party payers, other third parties, and some patients of respondent's members, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 6. In selecting an optometrist or purchasing optical products, consumers consider factors such as price and other terms of sale, quality of the service or product offered, convenience, reputation, and experience.

PAR. 7. Most optometric services have traditionally been provided by optometrists practicing from a single, private office location. Most optometrists practicing in this manner also have sold optical products from the same location. Most have engaged in little or no advertising regarding their services or products. Some optometrists do not conduct business in a traditional, private office setting. They may, for example, locate their practices in shopping centers or other locations customarily considered "commercial" in nature. They may practice in, or in proximity to, retail optical stores or retail stores for which optometric services and optical products are not the main line of business. Such practices can increase consumer access to optometric care and achieve operating efficiencies that may lower costs of many optometric services and optical products. These optometrists, or firms with which some of them affiliate, typically engage in more advertising than traditional practitioners. Advertising enables optometrists to inform consumers about factors important to their choice of an optometrist, and can benefit consumers by increasing the information available to them and promoting competition among optometrists.

PAR. 8. Respondent has combined or agreed with at least some of its members to restrain or lessen competition among themselves and with other eye care providers by:

A. Restricting truthful advertising by AAO members or prospective members concerning their prices, products, services, and qualifications;

B. Inducing or attempting to induce individual members or prospective members to cease advertising their prices, products, services, or qualifications, or otherwise cease seeking to solicit patients' business;

C. Withholding membership from prospective members who truthfully advertised their prices, products, services, or qualifications; and

D. Restricting the types of practice locations AAO members or prospective members may use.

PAR. 9. Respondent has engaged in various acts or practices in furtherance of this combination or agreement, including:

A. Enacting and adopting ethical restrictions, standards of conduct, policy statements, and guidelines that, among other things:

1. Require members' public statements, announcements of services, and promotional activities to "emphasize professional services" and prohibit all "direct solicitations" of patients; and

2. Require members to "practice in locations consistent with the majority of other health professionals in the area"; and

B. Interpreting and implementing the above ethical restrictions, standards of conduct, policy statements, and guidelines so as to, among other things:

1. Restrict truthful advertising by its members or prospective members of, among other things, their prices, fees, or charges, types of methods of treatment, professional training and experience, special expertise, and products, such as contact lenses, offered for sale; and

2. Prevent members or prospective members from practicing in commercial locations.

PAR. 10. The purposes or effects, and the tendency and capacity, of the combination or agreement and acts or practices of respondent as described above have been and are to unreasonably restrain competition and affect consumers in one or more of the following ways, among others:

A. Consumers are being deprived of the benefits of vigorous price and service competition among optometrists;

B. Consumers are being deprived of truthful information about optometrists' prices, products, services, and qualifications;

C. Optometrists are being prevented from disseminating truthful information about their prices, products, services, and qualifications; and

D. Consumers may have been deprived of the potential cost savings, convenience, and efficiency benefits of optometric practices located in commercial settings in their purchases of optometric services and optical products.

PAR. 11. The combination or agreement and the acts and practices described above constitute unfair methods of competition and unfair acts or practices which violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such combination or agreement is continuing and will continue absent the entry against respondent of appropriate relief.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional allegations set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Academy of Optometry, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at 5530 Wisconsin Avenue, N.W., Suite 950, in the City of Washington, District of Columbia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

For purposes of this order, the following definitions shall apply:

A. *AAO* means respondent American Academy of Optometry, Inc., its officers, councils, committees, representatives, agents, employees, successors, and assigns.

B. *Adverse action* means the revocation or suspension of, or refusal to grant, membership in AAO, or the disciplining or penalizing of any optometrist.

II.

It is ordered, That AAO, directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Restricting, regulating, impeding, declaring unethical, interfering with, or advertising against the truthful, non-deceptive advertising or publishing by any person of the prices, terms, or conditions of sale of optometric services or optical products, or of information about optometrists' services that are offered for sale or made available by optometrists or by any organization with which optometrists are affiliated;

B. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the solicitation, through truthful, non-deceptive advertising or by any other means, of patients, patronage, or contracts to supply optometric services or optical products, by any optometrist or by any organization with which optometrists are affiliated;

C. Restricting, regulating, or interfering with any optometrist's choice of a location at which the optometrist will practice; and

D. Inducing, urging, encouraging, or assisting any optometrist, group of optometrists, or any other non-governmental organization to take any of the actions prohibited by Part II of this order.

Nothing contained in Part II of this order shall prohibit AAO from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that AAO reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

III.

It is further ordered, That AAO shall cease and desist from:

A. Taking any adverse action against a person alleged to have violated any rule, policy, guideline, or ethical standard without first

providing such person with written notice of any such allegation, and without providing such person a reasonable opportunity to respond. The notice required by this part shall, at a minimum, clearly specify the rule, policy, guideline, or ethical standard alleged to have been violated, the specific conduct that is alleged to have violated the rule, policy, guideline, or ethical standard, and the reasons the conduct is alleged to have violated the rule, policy, guideline, or ethical standard; and

B. Failing to maintain for five (5) years following the taking of any action referred to in this part, in a separate file segregated by the name of any person against whom such action was taken, any document that embodies, discusses, mentions, refers, or relates to the action taken and any allegation relating to it.

IV.

It is further ordered, That AAO shall:

A. For a period of three (3) years, commencing on the date this order becomes final, provide each applicant for membership in AAO with a copy of the synopsis, attached hereto as Attachment A, of the complaint and this order at the time the applicant files his or her application for membership in AAO;

B. Within sixty (60) days after this order becomes final, send by first-class mail the letter attached hereto as Attachment B, together with a copy of the synopsis, attached hereto as Attachment A, of the complaint and this order to every optometrist who applied for membership in AAO within the last five (5) years but was not accepted for membership, and during whose application review process AAO or any committee or member of AAO raised an issue regarding any practices that are the subject of this order;

C. Within sixty (60) days after this order becomes final, publish the synopsis, attached hereto as Attachment A, of the complaint and this order in the *American Journal of Optometry and Physiological Optics,* or in any successor publication, with the same prominence as regularly published feature articles, and distribute a copy of that issue to each optometrist who is a member of AAO at the time this order becomes final;

D. Within ninety (90) days after this order becomes final, remove from its constitution, bylaws, and any other existing policy statements or guidelines of AAO, any provision, interpretation, or policy statement that is inconsistent with Part II of this order, and within one hundred and twenty (120) days after this order becomes final, publish and distribute, in the manner described in Part IV.C. of this

order, a copy of the revised versions of such documents, statements, or guidelines to each of its members;

E. Within one hundred and twenty (120) days after this order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied and is complying with this order;

F. For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including but not limited to any advice or interpretations rendered with respect to advertising or solicitation involving any optometrist or any entity with which optometrists are affiliated; and

G. Annually for a period of five (5) years after this order becomes final, and commencing twelve (12) months after this order becomes final, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Parts II, III, and IV of this order, including but not limited to any advice or interpretations rendered with respect to advertising or solicitation involving any optometrist or any entity with which optometrists are affiliated.

V.

It is further ordered, That AAO shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

Chairman Oliver did not participate.

ATTACHMENT A

SYNOPSIS OF CONSENT AGREEMENT BETWEEN
AMERICAN ACADEMY OF OPTOMETRY AND FEDERAL TRADE COMMISSION

The American Academy of Optometry ("Academy") has agreed to comply with the terms of a Consent Order issued by the Federal Trade Commission. A Complaint, setting forth the Commission's allegations against the Academy, has also been issued by the Commission. The Academy's agreement to the Consent Order is for settlement purposes only, and does not constitute an admission by the Academy of a law violation. In December 1981, the Academy adopted a set of guidelines that allow advertising by its members, but such guidelines require further amendment.

The Complaint alleges that the Academy maintained and enforced ethical standards

and guidelines and interpreted and implemented standards and guidelines which restricted truthful advertising and solicitation by members or prospective members, and prevented members or prospective members from practicing in commercial locations.

The Consent Order requires that the Academy not restrain advertising of prices, products and services, and other forms of solicitation by any optometrist, or any optometrist's choice of practice location. However, the Consent Order does not prohibit the Academy from adopting reasonable ethical guidelines to prevent false or deceptive advertising or uninvited, in-person solicitations of patients whose particular circumstances make them vulnerable to undue influence. The Consent Order also does not restrict the Academy from maintaining standards on the competency of its members.

The Consent Order requires that the Academy not revoke, suspend, or refuse to grant Academy membership, or discipline or penalize any optometrist, without first providing him or her with written notice of any allegations, and a reasonable opportunity to respond to them.

The Consent Order also requires the Academy to remove from its constitution, bylaws, policy statements, and guidelines any provision that is inconsistent with the Consent Order.

This synopsis is not intended to constitute an official interpretation of the Consent Order or Complaint, or to modify in any way their terms.

ATTACHMENT B

Dear Dr. _____:

This letter is to inform you of a Consent Order entered by the Federal Trade Commission. (A synopsis of the Order and the Complaint issued by the Commission is enclosed.) Under the terms of this Order, the American Academy of Optometry has agreed, without admitting to the non-jurisdictional factual or legal allegations in the Complaint, that we will not prevent or impede any optometrist from engaging in any form of truthful, non-deceptive advertising or solicitation, or interfere with any optometrist's choice of practice location. The Order does not prohibit the Academy from adopting and enforcing reasonable guidelines to prevent advertising that the Academy reasonably believes is false or deceptive, or uninvited, in-person solicitation of patients whose particular circumstances make them vulnerable to undue influence.

Under the Consent Order, we must ensure that our Constitution, Bylaws, policy statements and other ethical guidelines comply with the terms of the Order. In addition, if we take adverse action against a person alleged to have violated any of our ethical standards, we must provide that person with written notice of the allegations and a reasonable opportunity to respond to them.

We are sending copies of the enclosed synopsis of the Consent Order and Complaint, as it is published in the American Journal of Optometry and Physiological Optics, to you as an optometrist who applied for membership in the Academy within the last five years, but were not accepted for membership. Transmittal of this notice to you does not reflect an admission by the Academy that your non-acceptance for membership in the Academy was the result of any activity of the Academy now prohibited by the Consent Order. However, you are free, if you desire, to contact the Academy regarding either the submission of a new application for membership, or reconsideration of a previous application.

A copy of the Complaint and Consent Order are freely available upon request.

Sincerely,

(Name and Title)
American Academy of Optometry

Enclosure

IN THE MATTER OF

LITHIUM CORPORATION OF AMERICA

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3194. Complaint, July 22, 1986—Decision, July 22, 1986

This consent order prohibits, among other things, a Gastonia, North Carolina chemical company from entering into any agreements fixing prices or restricting sales of any lithium product. Additionally, respondent is prohibited from acting as an agent for any lithium producer when such action might unreasonably restrain competition.

Appearances

For the Commission: *Allee A. Ramadhan.*

For the respondent: *David L. Foster, Willkie, Farr & Gallagher,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Glithco Energy Corporation (Glithco), formerly Lithium Corporation of America, a wholly owned subsidiary of Gulf Resources and Chemical Corp., a corporation subject to the jurisdiction of the Commission has violated the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. DEFINITION

1. *Lithium product(s)* means any lithium chemical mined, extracted or milled from a natural resource including but not limited to: (a) lithium ore (petalite, lepidolite or spodumene); (b) lithium carbonate; (c) lithium hydroxide; (d) lithium chloride; and (e) lithium sulfate.

II. RESPONDENT

2. Lithium Corporation of America (LCA) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware maintaining its principal place of business at 449 North Cox Road, Gastonia, North Carolina.

3. On or about July 19, 1985, LCA acquired substantially all of the

assets of Glithco Energy Corporation, formerly Lithium Corporation of America, a wholly owned subsidiary of Gulf Resources and Chemical Corporation.

III. JURISDICTION

4. LCA is and, during all times relevant herein Glithco, was engaged in the business of mining, extracting and milling of lithium chemicals from a natural resource and selling lithium products in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. LCA is subject to the jurisdiction of the Federal Trade Commission.

IV. CONDUCT

5. Since at least 1980 and continuing up to at least June 1984, Glithco, China Metallurgical Import and Export Corporation (CMIEC) and Xinjiang Non-Ferrous Metals Corporation (XNMC) were engaged in an agreement, combination and conspiracy in unreasonable restraint of lithium products trade and commerce. Said unlawful agreement, combination and conspiracy were to the prejudice and injury of the public and of Glithco's customers and competitors and constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. There exists the cognizable danger that the unfair method of competition as alleged herein may resume and continue in the absence of the relief requested.

6. The unlawful combination and conspiracy has consisted of an agreement, understanding and concert of action between Glithco and CMIEC and XNMC, the effect of which has been to restrain trade in lithium hydroxide and/or other lithium products by Glithco's purchase of lithium hydroxide manufactured by XNMC and sold by CMIEC; and Glithco's actions to restrict or limit supplies of lithium hydroxide by soliciting an agreement with CMIEC that CMIEC would refuse to deal with chemical traders seeking to purchase lithium.

V. EFFECTS AND VIOLATION

7. The conduct, hereinabove alleged, has had the following effects, among others:

A. Competition between Glithco, CMIEC and XNMC in the sale of lithium hydroxide and other lithium products has been reduced or eliminated;

B. Competition between Glithco and other chemical traders of lithium hydroxide and other lithium products has been reduced or eliminated as a result of Glithco's exclusive distribution agreement with

CMIEC and Glithco's actions to ensure that CMIEC would refuse to deal with such traders;

C. Buyers of lithium hydroxide and other lithium products have been deprived of free and open competition in the purchase of such lithium products by Glithco's actions to ensure that CMIEC would refuse to deal with chemical traders; and

D. The importation of lithium hydroxide and other lithium products into the United States has been restrained.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Lithium Corporation of America (LCA) is organized, existing and doing business under and by virtue of the laws of the State of Delaware maintaining its principal offices at 449 North Cox Road, Gastonia, North Carolina.

2. On or about July 19, 1985, respondent acquired substantially all of the assets of Glithco Energy Corporation, formerly Lithium Corporation of America, a wholly owned subsidiary of Gulf Resources and Chemical Corporation.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the following definitions shall apply:

1. *LCA* means Lithium Corporation of America, as well as its officers, employees, divisions, subsidiaries, successors, assigns and the officers or employees of LCA's divisions, subsidiaries, successors and assigns.

2. *Lithium product(s)* means any lithium chemical mined, extracted or milled from a natural resource including but not limited to: (a) lithium ore (petalite, lepidolite or spodumene); (b) lithium carbonate; (c) lithium hydroxide; (d) lithium chloride; and (e) lithium sulfate.

3. *Person* means any natural person, corporate entity (including subsidiaries thereof), partnership, joint venture, trust, association, governmental or other legal entity whether foreign or domestic.

4. *Lithium seller* means any person engaged in the mining, extracting, milling or sale of any lithium product.

5. *Lithium producer* means any person engaged in the production of any lithium product by mining, extracting, or milling of such product from a natural resource, or the exclusive or substantially exclusive agent or distributor of such person in the sale or distribution of such lithium product. Lithium producer does not include any joint venture between LCA and other persons none of which is engaged in the production by mining, extracting or milling of any lithium product or is the exclusive or substantially exclusive agent or distributor of such person in the sale or distribution of such lithium product.

6. *Nonpublic information* means trade secrets or commercial or financial information which is confidential and has not been disseminated to the public.

7. *Sub-HSR transaction* means acquiring, directly or indirectly, the stock, share capital or assets of or any other interest in any lithium seller that is not reportable under the provisions of Section 7A of the Clayton Act, 15 U.S.C. 18a, and the rules promulgated thereunder but would be reportable if:

A. the Size-of-the-Parties Test as set forth in Section 7A(a)(2) of the Clayton Act were deemed inapplicable; and

B. five (5) million dollars were substituted for fifteen (15) million dollars in the size of transaction test set forth in Section 7A(a)(3)(B) as well as The Minimum Dollar Value Exemption set forth in Rule 802.20(a).

8. *Tolling* means the secondary-recovery of any lithium chemical by a person for which such services are compensated.

I.

It is ordered, That LCA shall cease and desist, directly or indirectly, or through any corporate or other device in connection with the offering for sale, sale or distribution of any lithium product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, from, directly or indirectly:

A. Entering into, cooperating in or carrying out any agreement, combination, conspiracy, understanding or planned common course of action between or among itself and any lithium producer to:

1. Adopt, establish, fix or maintain, directly or indirectly, the price, terms or conditions of sale for the sale of any lithium product to any third person; or

2. Refuse to deal with any third person seeking to purchase any lithium product from any lithium producer.

B. Soliciting, inducing, coercing, intimidating or compelling any lithium producer to refuse to deal with any person seeking to purchase any lithium product.

C. Taking any action to communicate, furnish, exchange, receive or discuss, directly or indirectly, with any lithium producer any nonpublic information relating to:

1. The price, terms or conditions of sale for any lithium product;

2. The costs of mining, extracting, milling, or selling any lithium product;

3. Forecasts of sales or supply of any lithium product; or

4. Plans for marketing any lithium product.

Provided, however, That nothing contained in Subparagraph C of this Paragraph shall prohibit LCA from:

Providing to or receiving from any lithium producer such information as is reasonably necessary for and solely related to the good faith negotiating for, entering into, or carrying out (a) a purchase, sale or tolling arrangement of any lithium product between LCA and such lithium producer; (b) acquisition of LCA or a substantial portion of its business or the acquisition by LCA of all or a substantial part of any lithium producer; and (c) any joint venture involving another lithium producer that is not reportable under Paragraph IV of this order.

II.

It is further ordered, That LCA shall cease and desist, directly or indirectly, or through any corporate or other device in connection with the offering for sale, sale or distribution of any lithium product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, from purchasing from any lithium producer and reselling, or acting as an agent for any lithium producer in the sale of, any lithium product where such purchase, resale or agency unreasonably restrains competition.

III.

Paragraphs I and II of this order do not prohibit conduct that is permitted by the Export Trading Company Act of 1982, 15 U.S.C. 4001–4021 (1982), or the Webb-Pomerene Act, 15 U.S.C. 61–66 (1982), or any amendments thereto, or conduct to which Subsection (a) of Section 5 of the Federal Trade Commission Act does not apply under the Foreign Trade Antitrust Improvements Act of 1982, Public Law 97–290, Title IV, or any amendments thereto. If within five (5) years from the date this order becomes final, an application is made by LCA under Title III of the Export Trading Company Act of 1982 for an Export Trade Certificate of Review relating to any lithium product, copies of the application and all documents filed by LCA in support thereof shall be filed simultaneously with the Commission.

IV.

It is further ordered, That for a period of five (5) years from the date this order becomes final, LCA shall within twenty (20) days after entering into any sub-HSR transaction provide the Federal Trade Commission written notification of such transaction and provide such information for LCA and the acquired party as required by the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended.

V.

It is further ordered, That LCA shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order. LCA also shall submit such further written reports as the staff of the Commission may from time to time request in writing to assure compliance with this order.

VI.

It is further ordered, That LCA shall notify the Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance with the obligations arising out of this order.

Chairman Oliver and Commissioner Strenio did not participate.

IN THE MATTER OF

UNITED BRANDS COMPANY

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8835. Order, May 14, 1974—Set Aside Order, July 29, 1986

The Federal Trade Commission has set aside a 1974 order (83 F.T.C. 1614) that required respondent to file special reports with the FTC about the company's access to land commercially suitable for lettuce cultivation. The Commission ruled that any competitive issues that might be raised do not exist since respondent is no longer in the lettuce business.

ORDER REOPENING AND SETTING ASIDE ORDER REQUIRING FILING OF SPECIAL REPORT ISSUED ON MAY 14, 1974

By a petition filed on April 29, 1986, United Brands Company ("UBC") requests that the Commission reopen the proceeding in Docket No. 8835 and modify the Order Requiring Filing of Special Report issued by the Commission on May 14, 1974. Pursuant to Section 2.51 of the Commission's Rules of Practice, UBC's petition was placed on the public record for comment. No comments were received.

Upon consideration of UBC's petition and supporting materials, and other relevant information, the Commission now finds that changed conditions of fact and the public interest warrant reopening the proceeding and setting aside the Order Requiring Filing of Special Report. The record demonstrates that the competitive concerns the order intended to address no longer exist and termination of the order to relieve UBC of compliance costs is in the public interest.

Accordingly,

It is ordered, That this matter be, and hereby is, reopened and that the Commission's Order Requiring Filing of Special Report be, and hereby is, set aside.

IN THE MATTER OF

BLUE LUSTRE HOME CARE PRODUCTS, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3195. Complaint, Aug. 1, 1986—Decision, Aug. 1, 1986

This consent order requires, among other things, an Indianapolis, Ind. manufacturer and marketer of chemical products and equipment for home and car care, to cease making unsubstantiated efficacy claims for "Rinsenvac 5", a carpet cleaning fluid sold to retailers in connection with the sale of rental do-it-yourself carpet cleaning machines.

Appearances

For the Commission: *Toby M. Levin* and *Joel C. Winston.*

For the respondent: *John R. Thornburgh, Ice, Miller, Donadio & Ryan,* Indianapolis, Ind.

COMPLAINT

The Federal Trade Commission, having reason to believe that Blue Lustre Home Care Products, Inc., a corporation, ("Blue Lustre" or "respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Blue Lustre is an Indiana corporation, with its offices and principal place of business at 7950 Castleway Drive, Indianapolis, Indiana.

PAR. 2. Respondent manufactures, advertises, offers for sale, and sells chemical products and equipment for the home and car care markets, including Rinsenvac 5 carpet cleaning product.

PAR. 3: The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4: Typical of respondent's advertisements for Rinsenvac 5, but not necessarily all-inclusive thereof, are attached hereto as Exhibits A through D. The aforesaid advertisements contain the following statements:

(a) Independent laboratory tests of detergent effectiveness (ASTM D 3050–75) proved

Rinsenvac 5 in hot water removed more than 3X as much dirt from fibers as Rug Doctor or Thermax. Rinsenvac 5 in cold water did too. (Exhibit A)

(b) RINSENVAC loves a challenge! And so when we were asked to submit our new RINSENVAC 5 Cleaner to an independent laboratory to test detergent effectiveness, we jumped at the opportunity. Using hot water and following the recommended mixing procedures, RINSENVAC 5 went head to head with RUG DOCTOR and THERMAX. And we won. RINSENVAC 5 removed over three times as much dirt as Rug Doctor and three and a half times as much dirt as Thermax. Even when RINSENVAC 5 was used in cold water, we outcleaned the competition by a wide margin. (Exhibit B)

(c) And lab tests prove it cleans *better* in cold water than other steam carpet cleaners do in hot. (emphasis in original) (Exhibit C)

(d) New RINSENVAC 5 actually cleans carpets better in cold water than other cleaners do in hot. Independent laboratory tests prove it! (Exhibit D)

PAR. 5: Through the use of the statements referred to in Paragraph Four and other statements in advertisements not specifically set forth herein, respondent has represented, directly or by implication, that:

(a) Rinsenvac 5 cleans carpets better in cold water than other steam cleaners do in hot water.

(b) Rinsenvac 5 removes over three times as much dirt from carpets as Rug Doctor brand carpet cleaner and three and one half times as much dirt as Thermax brand carpet cleaner.

PAR. 6: Through the use of the statements and representations set forth in Paragraphs Four and Five, and others not specifically set forth herein, respondent has represented, directly or by implication, that it possessed and relied upon a reasonable basis for said representations at the time it made the representations.

PAR. 7: In truth and in fact, at such times respondent did not possess and rely upon a reasonable basis for making such representations because (a) the testing standard respondent relied upon, American Society for Testing and Materials (ASTM) D 3050–75, is not intended for comparative product ranking and is not an appropriate test standard for comparing cleaning effectiveness of carpet cleaning products, and (b) other carpet cleaning products outperformed Rinsenvac 5 in the tests relied upon by respondent. Therefore, respondent's representation as set forth in Paragraph Six was, and is, false and misleading.

PAR. 8: Through the use of the statements set forth in Paragraph Four, and others not specifically set forth herein, respondent has represented, directly or by implication, that an independent laboratory test proves that Rinsenvac 5 cleans carpets better in cold water than other steam cleaners do in hot water.

PAR. 9: In truth and in fact for the reasons stated in Paragraph Seven, an independent laboratory test does not prove that Rinsenvac 5 cleans carpets better in cold water than other steam cleaners do in hot water. Therefore, respondent's representation as set forth in Paragraph Eight was, and is, false and misleading.

PAR. 10: The acts or practices of respondent as alleged in this complaint constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

In Hot or Cold Water
New Rinsenvac 5
Outcleans the Others!
#1
Rinsenvac 5
Cleaner
60.0%
RINSENVAC 5 IN HOT WATER
59.2%
RINSENVAC 5 IN COLD WATER
44.2%
REGULAR RINSENVAC CLEANER
IN HOT WATER
18.9%
RUG DOCTOR
IN HOT WATER
16.7%
THERM
HOT W
Independent laboratory tests of detergent effectiveness (ASTM-D-3050-75) proved Rinsenvac 5 in hot water removed more than 3X as much dirt from fibers as Rug Doctor or Thermax. Rinsenvac 5 in cold water did too. Rinsenvac 5 cleans, deodorizes, defoams, controls static electricity and protects carpets. Plus it works in Hot or Cold Water.

EXHIBIT A

EXHIBIT B

EXHIBIT B

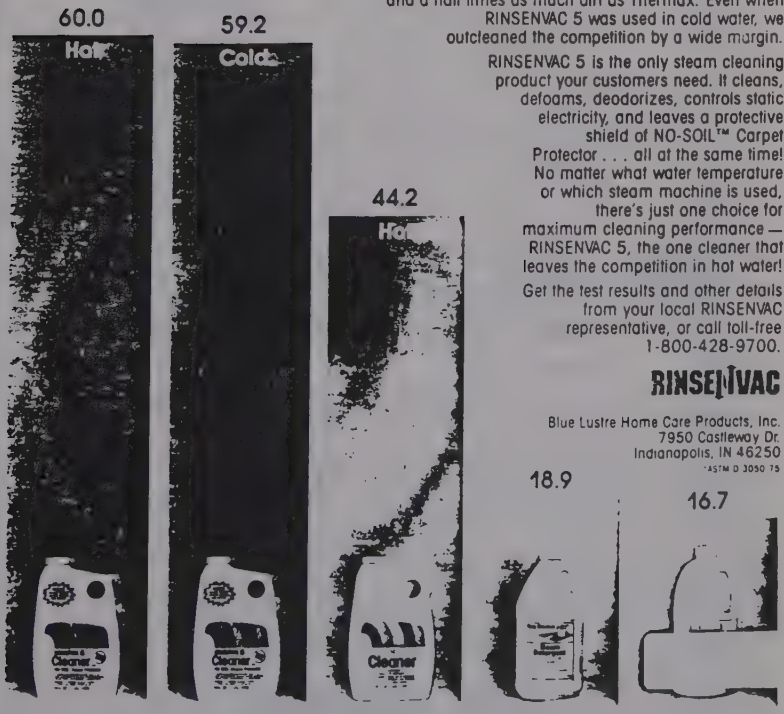
In Hot or Cold Water, New RINSENVAC® 5 Outcleans the Others!

stock up and leave your competition in hot water

RINSENVAC loves a challenge! And so when we were asked to submit our new RINSENVAC 5 Cleaner to an independent laboratory to test detergent effectiveness,* we jumped at the opportunity. Using hot water and following the recommended mixing procedures, RINSENVAC 5 went head to head with RUG DOCTOR® and THERMAX®. And we won. RINSENVAC 5 removed over three times as much dirt as Rug Doctor and three and a half times as much dirt as Thermax. Even when RINSENVAC 5 was used in cold water, we outcleaned the competition by a wide margin.

RINSENVAC 5 is the only steam cleaning product your customers need. It cleans, defoams, deodorizes, controls static electricity, and leaves a protective shield of NO-SOIL™ Carpet Protector . . . all at the same time! No matter what water temperature or which steam machine is used, there's just one choice for maximum cleaning performance — RINSENVAC 5, the one cleaner that leaves the competition in hot water!

Get the test results and other details from your local RINSENVAC representative, or call toll-free 1-800-428-9700.



RINSENVAC

Blue Lustre Home Care Products, Inc.
7950 Castleway Dr.
Indianapolis, IN 46250

*ASTM D 3050 75

EXHIBIT C

EXHIBIT C

True Value HARDWARE STORES ®

RADIO SPOT

CATEGORY : NETWORK
SCRIPT # : 3BL04
TITLE : BLUE LUSTRE
AIR DATE : SEPT./OCT. '84
LENGTH : 30 SECONDS

ITEM DESCRIPTION : RINSENVAC 5 CLEANER
MFR. NUMBERS : 40581

1 2 3 4 5 6 7 8 9 10

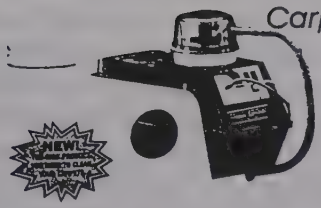
If you're still scrubbing carpets on your hands and knees because you're afraid steam cleaning will cause shrinkage or color damage, try Rinsenvac 5 cleaner from True Value Hardware Stores. Hi, Pat Summerall to say this cleaner works well in hot or cold water. And lab tests prove it cleans better in cold water than other steam carpet cleaners do in hot. You'll find a 1/2-gallon bottle of Rinsenvac 5 for just $8.99 and low rental prices on steam cleaning machines at participating True Value Hardware Stores and Home Centers.

EXHIBIT D

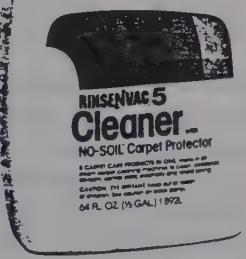
These Famous Brands Now...

EXHIBIT D

Carpet Cleaning Breakthrough!



NEW RINSENVAC® 5 WORKS IN COLD WATER FOR "STEAM" CLEANING WITHOUT WORRY!



New RINSENVAC 5 actually cleans carpets better in cold water than other cleaners do in hot. Independent laboratory tests prove it!

And that means worry-free carpet cleaning, because colors won't fade as with hot water. Stains won't set. Carpets won't shrink.

What's more, RINSENVAC 5 is the only product you need to buy. It cleans. Defoams. Deodorizes. Controls static electricity. Even leaves a protective shield of NO-SOIL™ Carpet Protector. And works in any steam cleaning machine.

Whatever water temperature you choose, there's just one choice for maximum cleaning performance. New RINSENVAC 5.

GREAT FALL HARDWARE SALE℠

GREAT VALUES Save now on national brands. Special prices and special offers on famous names and high quality products.

GREAT PRIZES Enter the big sweepstakes and win one of hundreds of prizes. Use coupon on first page of this special section.

GREAT RETAILERS Visit your local participating hardware store or home center. Deposit your sweepstakes coupon and find savings plus help for all your do-it-yourself, fix-up projects.

NRHA National Retail Hardware Association

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

Order

I.

It is ordered, That respondent Blue Lustre Home Care Products, Inc., a corporation, its successors and assigns, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any carpet cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

B. Representing in any manner, directly or by implication, any

performance characteristic, including any comparative performance of any carpet cleaning product, unless at the time of such representation respondent possesses and relies upon a reasonable basis for such representation, consisting of competent and reliable evidence which substantiates such representation; *provided, however,* that to the extent such evidence consists of any test, experiment, analysis, research, study or other evidence based on the expertise of any professional, such evidence shall be "competent and reliable" only if the test, experiment, analysis, research, study or other evidence is conducted and evaluated in an objective manner by a person qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results; and *provided further,* that for the purposes of this paragraph, testing conducted in accordance with the protocol ASTM D 3050–75 of the American Society of Testing and Materials shall not constitute competent and reliable evidence to substantiate any performance representation for any carpet cleaning product.

II.

It is further ordered, That for three years from the date that the representations are last disseminated, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys or other materials in its possession or control that contradict, qualify, or call into question such representation or the basis upon which respondent relied for such representation.

III.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations under this order.

IV.

It is further ordered, That the respondent shall, within sixty (60) days after service of this order upon it and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which it has complied or intends to comply with this order.

IN THE MATTER OF

BASS BROTHERS ENTERPRISES, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON ACTS

Docket 9178. Complaint, May 8, 1984—Decision, Aug. 6, 1986*

This consent order requires, among other things, a Fort Worth, Tex. producer of carbon black to obtain prior FTC approval for the acquisition of securities or assets of any company over a certain size in the U.S. carbon black industry.

Appearances

For the Commission: *Steven B. Feirman* and *Edward F. Glynn, Jr.*

For the respondents: *Charles E. Koob, Simpson, Watcher & Bartlett,* New York City.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of

* Complaint previously published at 107 F.T.C. 303.

its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Bass Brothers Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 2700 First City Bank Tower, 201 Main Street, in the City of Forth Worth, State of Texas.

2. Respondent Sid Richardson Carbon & Gasoline Co. is a corporation organized, and existing under the laws of the State of Texas with its corporate headquarters at 2700 First City Bank Tower, 201 Main Street, in the City of Fort Worth, State of Texas.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

Definitions

For the purposes of this order the following definitions shall apply:

Carbon black means furnace-process and thermal-process carbon black, whether used for rubber or other applications.

Bass Brothers means Bass Brothers Enterprises, Inc., as well as its officers, employees, agents, its parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of its parents, divisions, subsidiaries, successors and assigns.

SRCG means Sid Richardson Carbon & Gasoline Co., as well as its officers, employees, agents, its parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of its parents, divisions, subsidiaries, successors and assigns.

Ashland means Ashland Oil, Inc., as well as its officers, employees, agents, its parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of its parents, divisions, subsidiaries, successors and assigns.

Production capacity means the practical annual productive capacity of all units, including units currently in operation and units that could be put into operation with or without time delay or additional investment.

I.

It is ordered, That, unless Bass Brothers and SRCG have already done so, they will, not later than fourteen (14) days after this order

becomes final, terminate any agreement that provides for or contemplates the acquisition of Ashland's carbon black business by Bass Brothers or SRCG, including but not limited to the letter of intent signed on or about November 15, 1983, withdraw the premerger notification filing submitted to the Federal Trade Commission with respect to that letter of intent, return or destroy all documents containing or recording confidential information provided to Bass Brothers or SRCG by Ashland, and recover from Ashland all documents containing or recording confidential information provided to Ashland by Bass Brothers and SRCG, in connection with acquisition negotiations or agreements. Nothing herein contained shall relieve Bass Brothers or SRCG from any obligation of confidentiality imposed by agreement among Bass Brothers, SRCG and Ashland.

II.

It is further ordered, That for a period of five (5) years from the date this order becomes final, neither Bass Brothers nor SRCG shall acquire, directly or indirectly, without the prior approval of the Commission, any part of the United States carbon black business of any other person or corporation, whether represented by securities or assets, other than products or securities obtained in the regular course of business, if as a result of such acquisition Bass Brothers or SRCG would cumulatively increase its United States carbon black production capacity by more than 130 million pounds.

III.

It is further ordered, That while Paragraph II of this order is effective, Bass Brothers or SRCG shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment of substantially all assets, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries in the United States, that may affect compliance obligations arising out of this order.

IV.

It is further ordered, That Bass Brothers or SRCG shall, within thirty (30) days after making an acquisition of United States carbon black production capacity permitted under this order while Paragraph II of this order is effective, file with the Commission a written report describing such acquisition.

V.

It is further ordered, That Bass Brothers and SRCG shall, within sixty (60) days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, Aug. 6, 1986.

NOTICE OF INTENT TO RELEASE CONFIDENTIAL INFORMATION

This is to advise the parties to this proceeding that the Commission intends to order placement on the public record of Complaint Counsel's Motion to Dismiss the Complaint with Respect to Certain Respondents and Request for Certification of Motion to the Commission.

In making a determination to release *in camera* material in the course of an adjudicative proceeding, the Commission must balance the potential harm of such release to the protected party against the substantial interest in the public having available the factual background of a Commission decision. Public knowledge of such information permits both improved evaluation of the fairness and wisdom of a given Commission decision, and provides clearer guidance to affected parties. *See, RSR Corp.*, 88 F.T.C. 734 (1976).

Here we have concluded that no competitive or other harm would result from release of this information. Accordingly, release of this information will occur no sooner than ten (10) calendar days following service of this notice.

IN THE MATTER OF

THE J.B. WILLIAMS COMPANY, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2037. Consent Order, Sept. 9, 1971—Modifying Order, Aug. 20, 1986

The Federal Trade Commission has modified a 1971 order with respondents (79 F.T.C. 410) by terminating a perpetual obligation that the company submit advertising and labeling to the FTC at six month intervals to demonstrate compliance with the order. The FTC concluded that it was in the public interest to relieve respondents of the costs of compliance with this provision.

ORDER REOPENING AND MODIFYING CEASE AND DESIST ORDER ISSUED ON SEPTEMBER 9, 1971

On February 19, 1986, Beecham, Inc., on behalf of itself and its wholly-owned subsidiary, J.B. Williams Company, Inc., petitioned the Commission to reopen the proceeding in Docket No. C-2037 and modify the order aginst J.B. Williams issued by the Commission on September 9, 1971. Pursuant to Section 2.51 of the Commission's Rules of Practice, Beecham's petition was placed on the public record for comment. No comments were received.

Summary of Order

The order prohibits certain product effectiveness representations in advertising the product, "Proslim", or "any other purported weight reducing or weight control product".

In addition, the order prohibits the dissemination of any advertising which, in any manner, makes reference to scientific or medical tests or studies as substantiating any representation or claim as to the effectiveness or performance of any consumer product, unless such scientific tests or studies do, in fact, substantiate such representation or claim. The order further imposes the continuing obligation on the respondent to submit to the Commission samples of all advertising and labeling every six months to show continued compliance.

Request That Provision Requiring Substantiation For Product Claims Be Set Aside

Beecham first requests that Part II of the order, which requires substantiation for product claims, be deleted from the order on the basis of changed conditions of fact and public interest considerations.

Beecham bases its request that Part II be deleted from the order

primarily on changed conditions of fact. First, it states that the weight control products that were the subject of the order are no longer being manufactured, advertised or sold. Secondly, it states that J.B. Williams, the "bad actor" involved in the conduct leading to the order, no longer effectively exists. Therefore, Beecham argues that, since the products that were the subject of the order and the transgressor whose conduct led to the order no longer effectively exist, it is in the public interest to eliminate such a fencing-in provision.

In support of its argument that these changed conditions of fact require that Part II be deleted from the order, Beecham cites cases involving appellate review of orders with fencing-in provisions and competition cases where the Commission removed fencing-in provisions from orders because changing market conditions rendered the fencing-in provisions unnecessary. Beecham, however, fails to cite authority for the relief that it is requesting.

The Commission rejects Beecham's argument that the discontinuance of the products that were the subject of the complaint or that corporate personnel changes are changed conditions of fact requiring that the order be modified by deleting Part II from the order. The sale and advertising of weight control products may be resumed. More importantly, Part II is applicable to "any consumer product", not just to weight control preparations. In its April 11, 1984 letter to Beecham denying its prior petition to vacate this order in its entirety, along with others, the Commission rejected Beecham's argument that corporate personnel changes is a sufficient changed condition of fact to justify the relief requested in that petition. No new arguments have been advanced that would establish that this changed condition of fact warrants the modification requested herein. Furthermore, Beecham has cited no authority for its argument that the two asserted factual changes taken together, rather than considered separately, warrant the deletion of a fencing-in provision of an order.

Part II of the order is a limited and reasonable substantiation provision that should not impose unnecessary burdens on Beecham, and Beecham has not shown that it does impose such burdens. Simply stated, Part II merely requires that medical tests or studies do, in fact, substantiate effectiveness or performance claims if Beecham makes reference in advertising to such medical tests or studies. If Beecham does not have medical tests or studies to substantiate such claims, it may not make reference to such medical tests or studies. *See Pfizer, Inc.*, 81 F.T.C. 23 (1972).

Request That, If Part II Is Not Deleted From Order, It Be Qualified By The Addition Of A Second Paragraph.

If the Commission declines to delete Part II from the order, Beecham asks that the following paragraph be inserted in the order as the second paragraph in Part II of the order:

Provided, however, That such scientific or medical tests or studies shall be deemed to substantiate any such representation or claim where competent scientific or medical persons retained or employed by respondent have a reasonable good faith belief that such substantiation in fact exists regardless of whether some other scientific or medical person or persons may or do have a belief to the contrary.

The request that the order be modified to place the above paragraph in the order is based on changed conditions of law and public interest considerations. Beecham says that Commission law was changed with *Pfizer, Inc., supra,* in 1972. It argues that Part II of the order may be interpreted by staff acting unreasonably as an "absolute basis" standard, rather than a "reasonable basis" standard. An "absolute basis" standard, according to Beecham, may require that its substantiation be "free from all uncertainties or good faith differences among competent scientists, medical personnel and other experts."

Beecham further argues that the substantiation standard in Part II is ambiguous and that it is "fundamentally unfair" not to provide Beecham with clear guidance on the applicable standard which must be met under Part II.

Arguing that the public interest requires that the order be reopened and modified by the addition of its proposed paragraph, Beecham cites *General Motors Corporation,* 104 F.T.C. 511 (1984), as an order which was modified "to avoid any unintended restriction on the dissemination to the public of information material to purchasing decisions." The *General Motors* approach is equally appropriate here, Beecham argues, "[to] eliminate the ambiguities in the advertising substantiation standards applicable under the Proslim order and to permit Beecham to make representations for which it has a reasonable basis and which consumers may wish to hear."

The Commission does not view Part II of the order as imposing on Beecham an "absolute basis" standard requiring unanimity of all scientists and medical personnel. If Beecham refers to medical tests or studies in its advertising, such tests or studies must substantiate such claim. The ultimate determination of whether Beecham's substantiation does, in fact, substantiate its claim is not made by staff, but it is made by the district court in an enforcement action. On the other hand, the paragraph that Beecham wishes to be placed in the order would, in the Commission's opinion, create an absolute stan-

dard. It would establish that the "reasonable good faith belief that such substantiation exists" possessed by "competent scientific or medical persons retained or employed" by Beecham is absolute "regardless of whether some other scientific or medical person or persons may or do have a belief to the contrary." There is no justification for the substantiation standard proposed by Beecham.

As to the public interest argument, the Commission has found that Beecham has failed to demonstrate that the public interest requires modification. The current situation is not comparable to the factual situation in *General Motors*. In *General Motors*, the modification was considered to be in the public interest because it permitted the flow of information to consumers concerning normal and ordinary handling characteristics of General Motors' vehicles which would have been impossible under the order.

Request That Product Coverage Be Limited

If the Commission declines to delete Part II from the order, Beecham requests that product coverage in Part II be limited to:

> Products intended for consumer use which are (a) sold under a trademark in use by J.B. Williams at the time that J.B. Williams was acquired by Beecham, (b) sold for the same uses as J.B. Williams sold such preparations at such time and (c) composed of substantially the same constituents as were in such products at such time.

The petition notes that the Commission's letter to Beecham of April 11, 1984, denying its request that this order and three other orders be set aside, also advised Beecham that it is bound by this order and the other J.B. Williams orders with respect to its advertising of the J.B. Williams consumer products. Changes in the products make it imperative, according to Beecham, that the Commission provide a more specific definition of which products are J.B. Williams consumer products and which are Beecham consumer products.

The reformulation of Beecham products is said to be a changed condition of fact requiring the product coverage modifications. With reformulations, Beecham asserts that it becomes increasingly difficult to determine whether any such product is still a "preparation of substantially similar composition" or possesses "substantially similar properties" to the old product.

Next, the integration of the J.B. Williams manufacturing facilities with those of Beecham is stated to be a changed condition of fact. Since a J.B. Williams product may be manufactured at a Beecham facility, and a Beecham product may be manufactured at a J.B. Williams facility, Beecham says that the products may be confused.

A final changed condition of fact, according to Beecham, is the

dismissal of almost all J.B. Williams management personnel after Beecham's acquisition of that company. None of those responsible for the illegal conduct prohibited by the Proslim order are currently employed by Beecham.

Beecham also argues that adoption of the product coverage modifications is in the public interest "as giving Beecham guidance on precisely which products are and are not" J.B. Williams consumer products "covered by the order."

The changed conditions of fact and public interest considerations recited in the petition do not justify the relief requested. Product reformulations, the integration of J.B. Williams manufacturing facilities with those of Beecham, management turnover, and the development of new products do not, in the opinion of the Commission, render J.B. Williams consumer products less identifiable. The Commission has previously determined that the order in Docket No. C–2037 only governs the advertising of J.B. Williams' consumer products. J.B. Williams' products and Beecham products are clearly distinguishable. J.B. Williams products would include any products manufactured by J.B. Williams at the time of the acquisition, and modifications thereto, sold and promoted under the same or substantially similar brand names, and any derivative products, *e.g.*, Sominex II, Geritol Complete, etc. However, to the extent that identification of J.B. Williams products is an issue, a determination may be made on a case-by-case basis.

Request That Perpetual Reporting Requirement Be Eliminated

The last modification requested by Beecham would delete from Part IV of the order a requirement that samples of all advertising, labels and labeling for weight control products and all advertisements for any consumer product that refer to scientific or medical tests or studies must be submitted every six months to demonstrate compliance with the order.

Upon consideration of Beecham's petition and other relevant information, the Commission now finds that the public interest warrants reopening the proceeding and modifying Part IV of the order. The record demonstrates that termination of the perpetual periodic obligation to submit advertising and labeling to the Commission to relieve respondent of compliance costs is in the public interest.

It is therefore ordered, That this matter be, and hereby is reopened and that the last paragraph of Part IV of the Commission's order be, and hereby is modified to read as follows:

It is further ordered, That respondents submit to the Commission within sixty (60) days after the order becomes final all advertising,

labels and labeling, for "Proslim" or "Proslim 7 Day Reducing" wafers, diet drink mix, or any other purported weight reducing or weight control product, and all advertisements for any consumer product which in any manner make reference to scientific or medical tests or studies as allegedly substantiating any representation or claim as to the effectiveness or performance of any such product, to show the manner of compliance with this order.

IN THE MATTER OF

SAGA INTERNATIONAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3196. Complaint, Aug. 20, 1986—Decision, Aug. 20, 1986

This consent order, among other things, requires a Compton, Calif. manufacturer and seller of ultrasonic pest-control devices to refund the full purchase price of its "Home Free" pest-control product to any consumer who bought the device after Dec. 31, 1983. Additionally, respondent is required to provide signs for retailers to post about the availability of refunds and advertise their availability through newspaper ads. Further, respondent is prohibited from making any performance or efficacy claims about any ultrasonic pest-control product unless it possesses and relies upon competent and reliable evidence that substantiates its claims.

Appearances

For the Commission: *Harrison J. Sheppard.*

For the respondents: *Vicki E. Baer, Holme, Roberts & Owen,* Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Saga International, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Saga International, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its offices and principal place of business located at 1220 West Walnut Street, Compton, California.

PAR. 2. Respondent, at all times mentioned herein, has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent, advertises, offers for sale, sells and distributes ultrasonic pest control devices under the brand name of "Home Free".

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the purchase of the Home Free ultrasonic pest control product, respondent has disseminated, directly and through its marketers and distributors, various promotional materials, including suggested advertisements, sales brochures and promotional pamphlets, which contain statements respecting the performance of the Home Free ultrasonic pest control product. Examples of such promotional materials, which include the Home Free package, are attached hereto as Exhibits A through J.

PAR. 5: Typical statements in said promotional materials, but not necessarily inclusive thereof, are:

A. Ultrasonic sound waves repel rats, mice, and many insects from your home . . .repels. . .roaches, flies, fleas, mosquitos, bedbugs, spiders, and ticks.

B. Electronically drives away insects and pests, with powerful pulsating blasts of sound waves. . .in a safe effective way!

C. Safe. . .eliminates dangerous poisons from your home.

D. It has been found effective on a wide range of pests including fleas, flies, mosquitos, crickets, roaches, rats, and mice. The HOME FREE, when properly used, sends out an ultrasonic signal that irritates the super sensitive auditory nerves of insects and rodents, and thereby forces them to leave the area protected by it's [sic] sound.

E. Rodents. . .will leave the area right away and results will be apparent almost at once.

F. It may take up to 4–6 weeks before the insect army is gone.

G. HOME FREE keeps your home free from bugs, insects, rats, and mice. . .

H. HOME FREE combined science and electronics to create a pest control system that is effective, and easy to use.

PART I

Pest Elimination Claims

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four and Five are incorporated by reference herein.

PAR. 6. Through the use of statements referred to in Paragraph Five and others not specifically set forth therein, respondent has represented, and is now representing, directly or by implication, that use of the Home Free:

a. Eliminates rats, mice, cockroaches, and other pests from a purchaser's home or place of business.

b. Eliminates rodents and insects from a purchaser's home or place of business within four to six weeks or sooner.

c. Prevents rodents and insects from remaining in or entering an area in a purchaser's home or place of business where the Home Free device is in use.

PAR. 7. In truth and in fact, use of the Home Free:

a. Does not eliminate rats, mice, cockroaches, and other pests from a purchaser's home or place of business.

b. Does not eliminate rodents and insects from a purchaser's home or place of business within four to six weeks or sooner.

c. Does not prevent rodents or insects from remaining in or entering an area in a purchaser's home or place of business where the Home Free device is in use.

Therefore, the representations set forth in Paragraph Six were, and are, false and misleading.

PART II

Pest Control Claims

Alleging further violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraph One, Two, Three, Four and Five are incorporated by reference herein.

PAR. 8. Through the use of the statements referred to in Paragraph Five, and others not expressly set out therein, respondent has represented, and is now representing, directly or by implication, that use of the Home Free:

a. Effectively controls rats and mice in the home or place of business.

b. Effectively controls insects, such as cockroaches, in the home or place of business.

c. Eliminates the need to use, in the home or place of business, alternative rodent or insect control products such as traps, powders, sprays or other chemicals.

PAR. 9. In truth and in fact, use of the Home Free:

a. Does not effectively control rats and mice in the home or place of business. Any reaction by rodents to the Home Free would, at best, only be of short duration. Rodents habituate to ultrasound and will return to their chosen nesting or feeding habitats even in the presence of such ultrasonic products.

b. Does not effectively control insects, such as cockroaches, in the home or place of business.

c. Does not eliminate the need to use, in the home or place of business, alternative rodent or insect control products such as traps, powders, sprays, or other chemicals.

Therefore, the representations set forth in Paragraph Eight were, and are, false and misleading.

PART III

Reasonable Basis—Substantiation

Alleging further violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four and Five are incorporated by reference herein.

PAR. 10. Through the use of the statements referred to in Paragraph Five, and others not expressly set out therein, respondent has represented and is now representing, directly or by implication, that at the time of making the representations set forth in Paragraphs Six and Eight respondent possessed and relied upon a reasonable basis for those representations.

PAR. 11. In truth and in fact, at such times, respondent did not possess and rely upon a reasonable basis for making those representations.

Therefore, the representation set forth in Paragraph Ten was, and is, false and misleading.

PAR. 12. The use by respondent of the aforesaid representations as set forth in Parts I – III, and the placement, in the hands of distributors and retailers, of promotional materials through which others may have conveyed those representations, have had the tendency and capacity to mislead consumers and to induce the purchase of respondent's ultrasonic pest control products.

PAR. 13. The acts and practices of respondent, as herein alleged, constituted, and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

EXHIBIT A

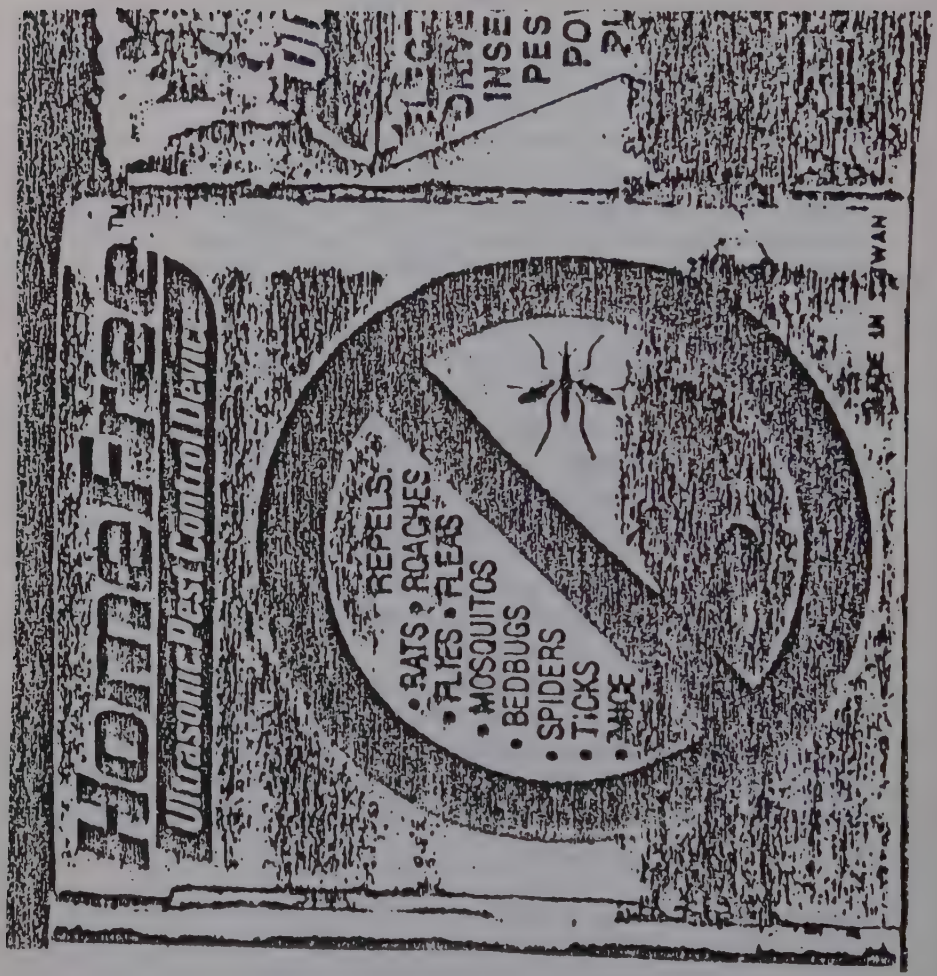

REPELS:
• RATS • ROACHES
• FLIES • FLEAS
• MOSQUITOS
• BEDBUGS
• SPIDERS
• TICKS
• MICE
Ultrasonic Pest Control Device

EXHIBIT B

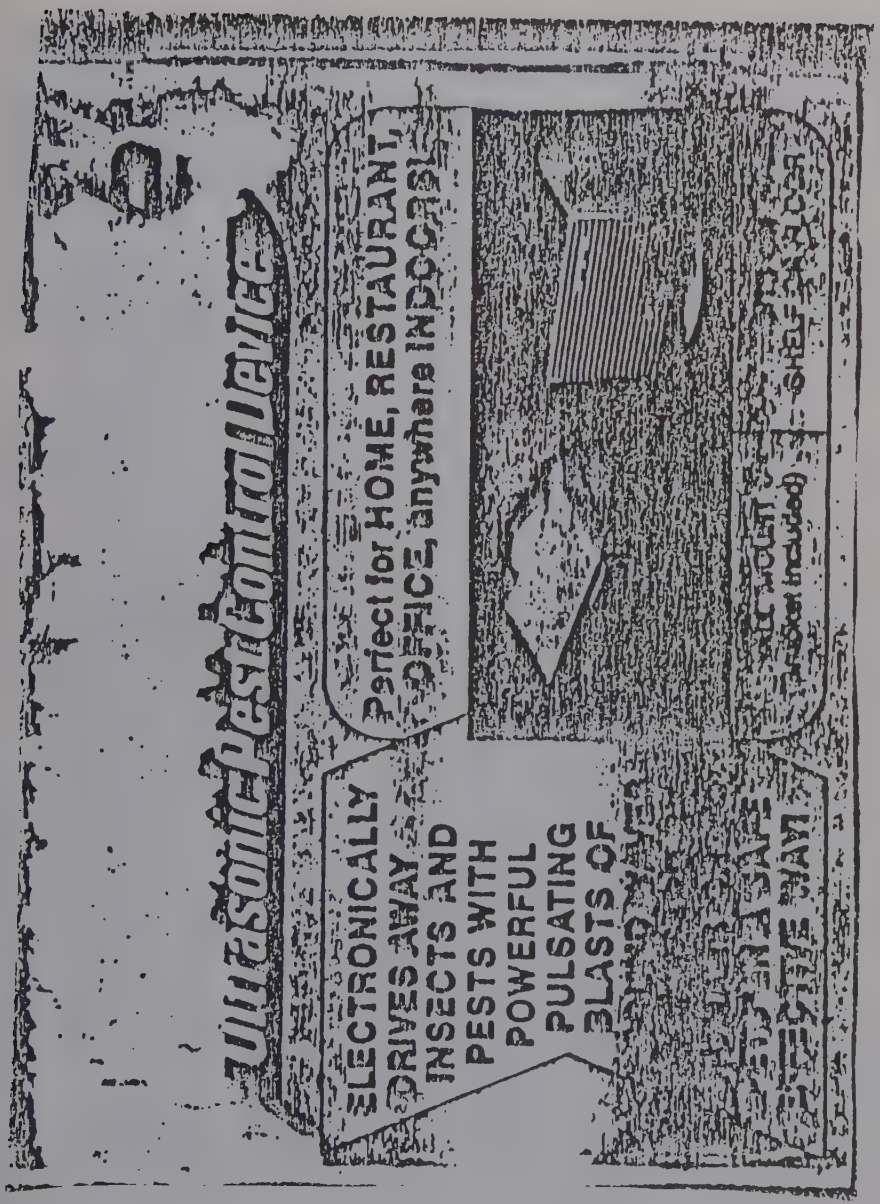

ELECTRONICALLY
DRIVES AWAY
INSECTS AND
PESTS WITH
POWERFUL
PULSATING
BLASTS OF

EXHIBIT C

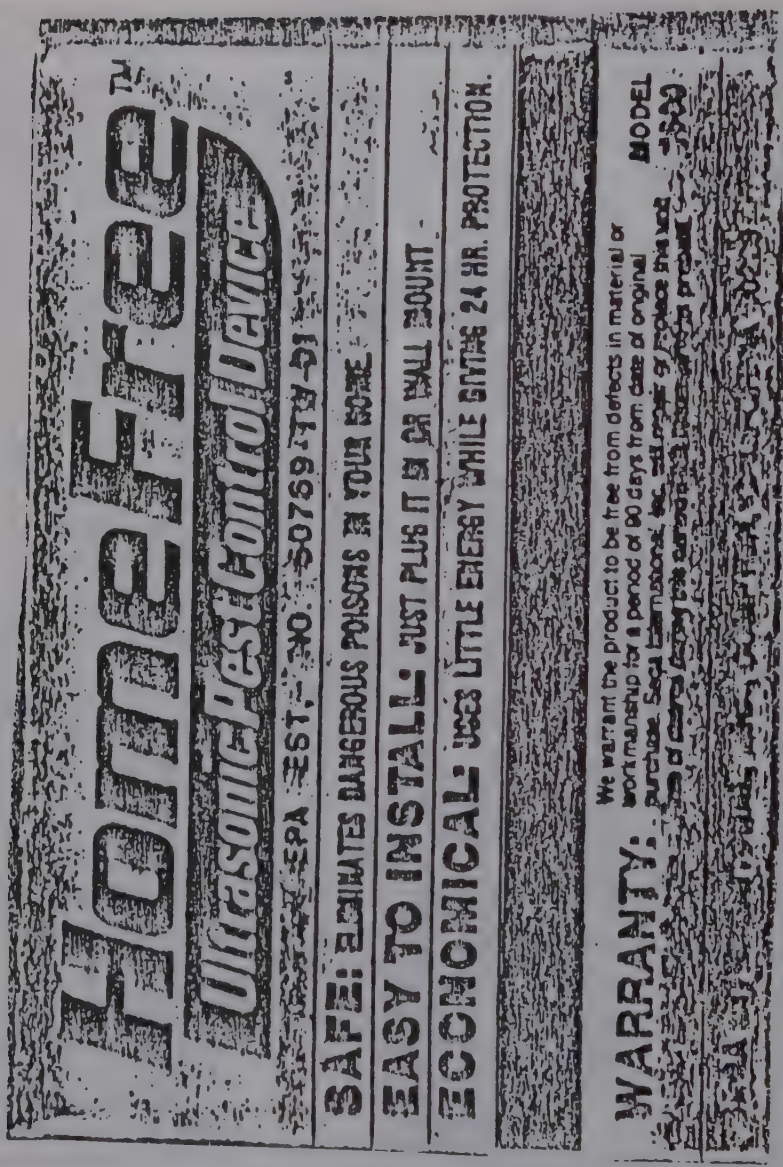

HomeFree
Ultrasonic Pest Control Device
EPA EST. NO. 50759-TX-01
SAFE: ELIMINATES DANGEROUS POISONS IN YOUR HOME
EASY TO INSTALL: JUST PLUG IT IN OR INSTALL MOUNT
ECONOMICAL: USES LITTLE ENERGY WHILE GIVING 24 HR. PROTECTION.
WARRANTY:
We warrant the product to be free from defects in material or workmanship for a period of 90 days from date of original
MODEL

EXHIBIT D

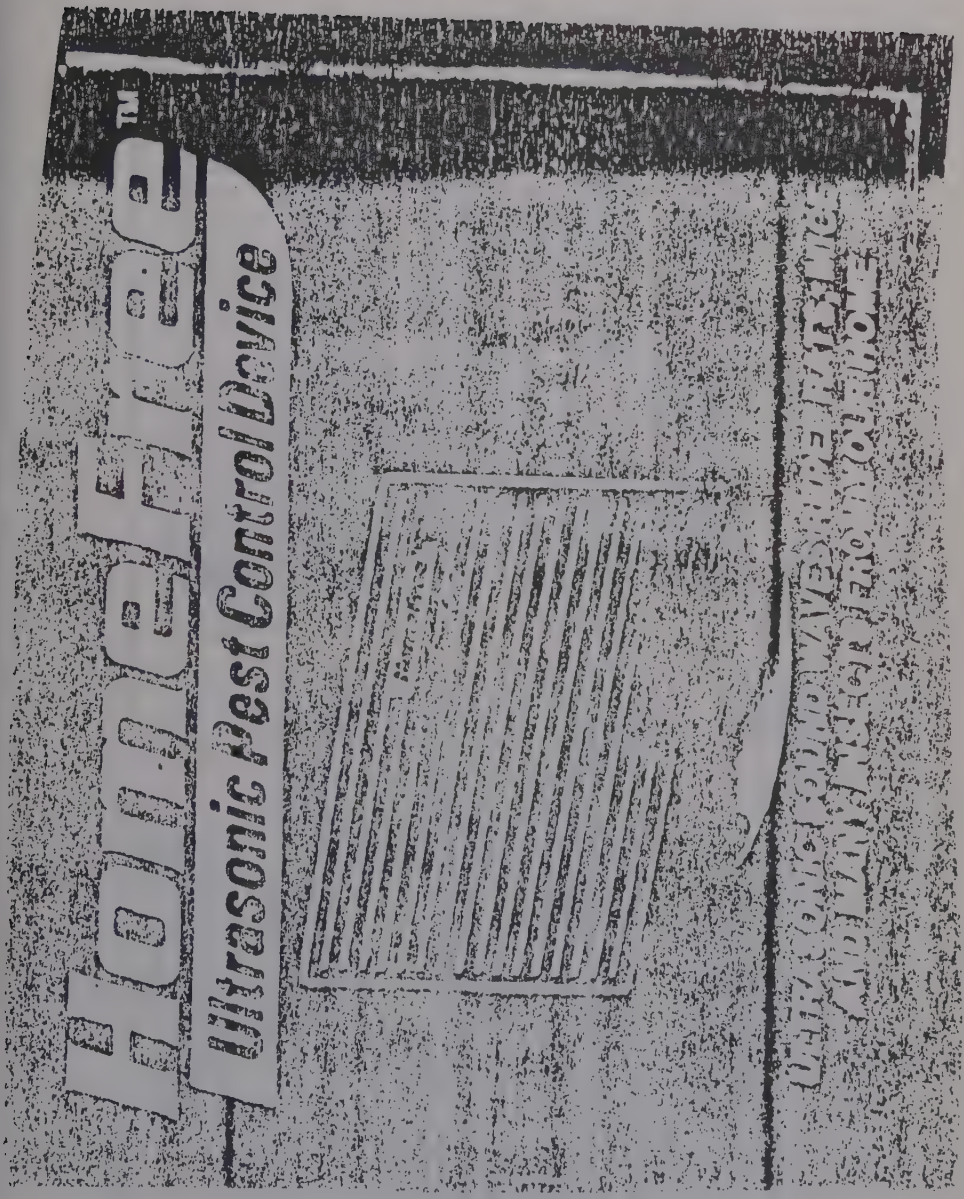


EXHIBIT E

LIMITED WARRANTY
SAGA INTERNATIONAL INC. the makers of HOME FREE warrant the unit to be free of defects in material or workmanship for 90 days from date of original purchase If you experience a problem, send the HOME FREE prepaid to the address below with proof of purchase from the store and we will repair or replace it free of charge and send it back to you freight prepaid
This warranty does not cover damage of any kind of mis handling or misuse Be sure to pack any returns carefully so damage does not occur
SAGA
SAGA INTERNATIONAL INC.
1220 WEST WALNUT ST.
COMPTON, CALIFORNIA 90220
U. S. A.
HomeFree
Ultrasonic pest control
• Repels Rats, Mice and many insects from your home.
• Ultra Sonic Sound Waves can't be heard by humans or most pets.
• Economical, uses only 4 Watts of power, costs only pennies a day.
• Eliminates the need for costly and dangerous pest killing chemicals
• Gives long lasting relief after 4-6 weeks of operation.
Model
1600

EXHIBIT F

HomeFree™

HOME FREE is an ultrasonic pest control device that should rid your home of most unwanted insects bugs and rodents

It has been found effective on a wide range of pests including fleas flies mosquitos, crickets roaches rats, and mice. The HOME FREE when properly used, sends out an ultrasonic signal that irritates the super sensitive auditory nerves of insects and rodents and thereby forces them to leave the area protected by it's sound

The range of the ultrasonic sound must continually change however. To make it effective and therefore we have designed the signal from HOME FREE to cover a wide variable range that makes it impossible for the pest to become used to a signal sound pattern and learn to live with it. Instead, the continual variation of sound literally forces the pest away

Insects and bugs that now infest your home have been laying eggs in your carpets drapes and other hidden spots These eggs must hatch and the newborn insects must be exposed to the sound before complete and lasting results are assured Therefore please do not expect immediate results It may take up to 4-6 weeks before the insect army is gone

Rodents will react much more quickly they will leave the area right away, and results should be apparent almost at once

The sound wave produced by HOME FREE should be free to travel around a room, unhibited by carpet or padded furniture For this reason, we have made it possible to wall mount the HOME FREE for most efficient results The walls will allow the sound to travel uninhibited throughout the area If you cannot wall mount the HOME FREE, be sure to place it on a hard surface and not on carpet or bound furniture

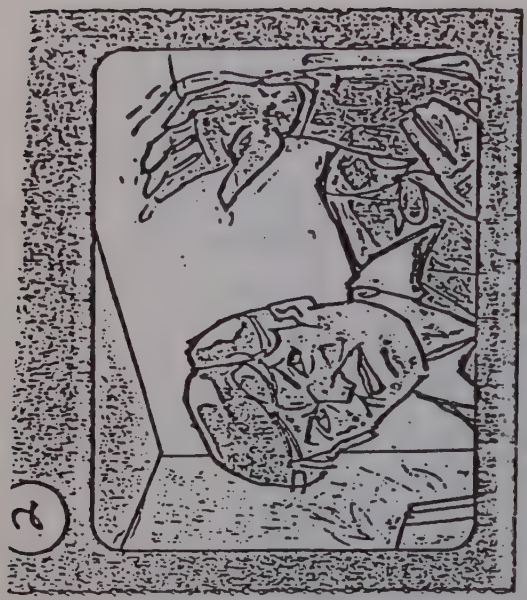
The red indicator light tells you your HOME FREE ultrasonic pest control device is working Leave it plugged in all the time to protect your home continuously

On the back we have a test control knob so that the sound can be lowered to a range that you can hear After pressing this test button and hearing the sound release the button and the sound should not climb into the "Ultrasonic Range" At this frequency the sound will not effect you or your house pets Do not use HOME FREE products on pet rats mice hamsters, rabbits, monkeys, or any other animal of the rodent family

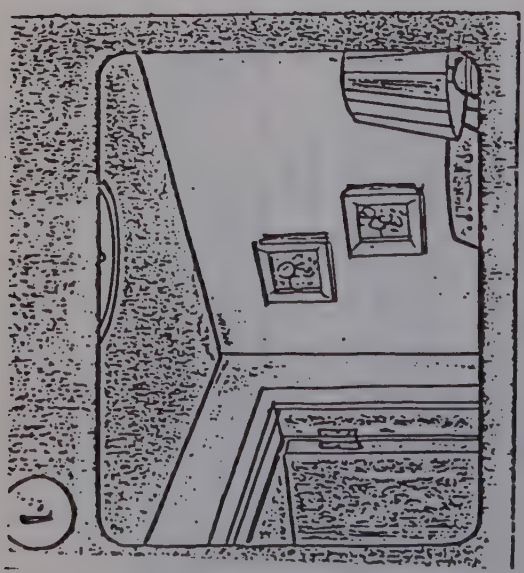
The HOME FREE ultra sonic pest control device may be needed in more than one area of your home In that case you should select more than one unit since it must operate continuously for best location and not be moved to be effective

To Wall Mount: Remove base to back unit Use screws and use hang hole to fasten to wall

EXHIBIT G



SFX: Loud buzzing...then SLAP!



VIDEO: CLOSE-UP of man, eyes rolling.

Ex. 7. 6 - G

SFX: Woman's screeching.

ANNCR: "...even rats and mice."

VIDEO: Woman on chair

ANNCR: "Tired of being bugged by bugs? Fight back with the new electronic pest control that gets rid of fleas, flys, bugs, and..."

VIDEO: Camera catches a dog scratching; man next to dog (also scratching)

ANNCR: "HOMEFREE keeps your home free from bugs, insects, rats, and mice..."

VIDEO: Pan & Beauty shot in room.

ICR: "When you plug in HOMEFREE, the ultrasonic sound drives 'em right out of your house."

IEO: Blank wall with AC outlet.

INCR: "...and is safe for kids and pets.
No harmful poisons or sprays to worry about."

deo: Family enjoying their peace in the room.

IPER: 100% non-toxic

TAG: "HOMEFREE - The Ultrasonic Pest Contro
Available at...

VIDEO: Tight Beauty Shot, list of stores.

EXHIBIT H

HOMEFREE :55/:05

LISTEN CAREFULLY.
YOU ARE ABOUT TO HEAR THE SOUND OF A REVOLUTION IN HOME PEST CONTROL. THE SOUND OF ULTRASONIC WAVES UNLEASHED BY THE HOMEFREE ULTRASONIC PEST CONTROL WYWTEM.
ARE YOU LISTENING?
HERE WE GO:
(THREE-FOUR SECONDS SILENCE)
YOU DIDN'T HERE IT, DID YOU?
YOU WON'T. AND YOUR KIDS AND PETS WON'T.
BUT FLEAS,FLIES, BUGS, EVEN RATS AND MICE WILL.
AND THAT SOUND WE CAN'T HEAR, WILL DRIVE THEM CRAZY, AND OUT OF YOUR HOUSE FOR GOOD.
THE HOMEFREE BLANKETS YOUR HOME WITH HIGH FREQUENCY ULTRASONIC SOUND ONLY PESTS, BUGS, AND RODENTS CAN HEAR
HOMEFREE COMBINED SCIENCE AND ELECTRONICS TO CREATE A PEST CONTROL SYSTEM THAT IS EFFECTIVE, AND EASY TO USE.
ALL YOU DO IS PLUG IT IN.
AND REMEMBER, YOU CAN'T HEAR IT WORK.
YOU CAN ONLY SEE THE RESULTS!
HOMEFREE ULTRASONIC.
(:05 TAG)

EXHIBIT I

HOMEFREE :55/:05

LISTEN VERY CAREFULLY.
YOU ARE ABOUT TO HEAR THE SOUND OF THE HOMEFREE ULTRASONIC
PEST CONTROL SYSTEM HARD AT WORK, DRIVING BUGS AND RODENTS
CRAZY, AND OUT OF YOUR HOUSE FOR GOOD.
ARE YOU LISTENING?
HERE IT IS:
(THREE-FOUR SECONDS SILENCE)
YOU DIDN'T HEAR IT, DID YOU?
YOU WON'T.
AND YOUR KIDS AND PETS WON'T.
BUT FLEAS, FLIES, BUGS, EVEN RATS AND MICE WILL.
AND THAT SOUND WE CAN'T HEAR, IRRITATES THEM
SO MUCH, THEY LEAVE YOUR HOME IN DROVES.
THE HOMEFREE BLANKETS YOUR HOME WITH HIGH FREQUENCY
ULTRASONIC SOUND WAVES ONLY PESTS, BUGS AND RODENTS CAN HEAR.
BY COMBINING SCIENCE AND ELECTRONICS, HOMEFREE HAS MADE
PEST CONTROL EFFECTIVE, AND EASY TO USE.
NO CHEMICALS, ODORS, OR SPILLS.
ALL YOU DO IS PLUG IT IN.
AND REMEMBER, YOU CAN'T HEAR IT WORK.
YOU CAN ONLY SEE THE RESULTS.
HOMEFREE ULTRASONIC.
(:05 TAG)

EXHIBIT J

- Repels Rats, Mice and many insects from your home.
- Ultrasonic soundwaves can't be heard by humans or most pets.
- Economical, uses only 4 watts of power costs only pennies a day.
- Eliminates the need for costly and dangerous pest killing chemicals.

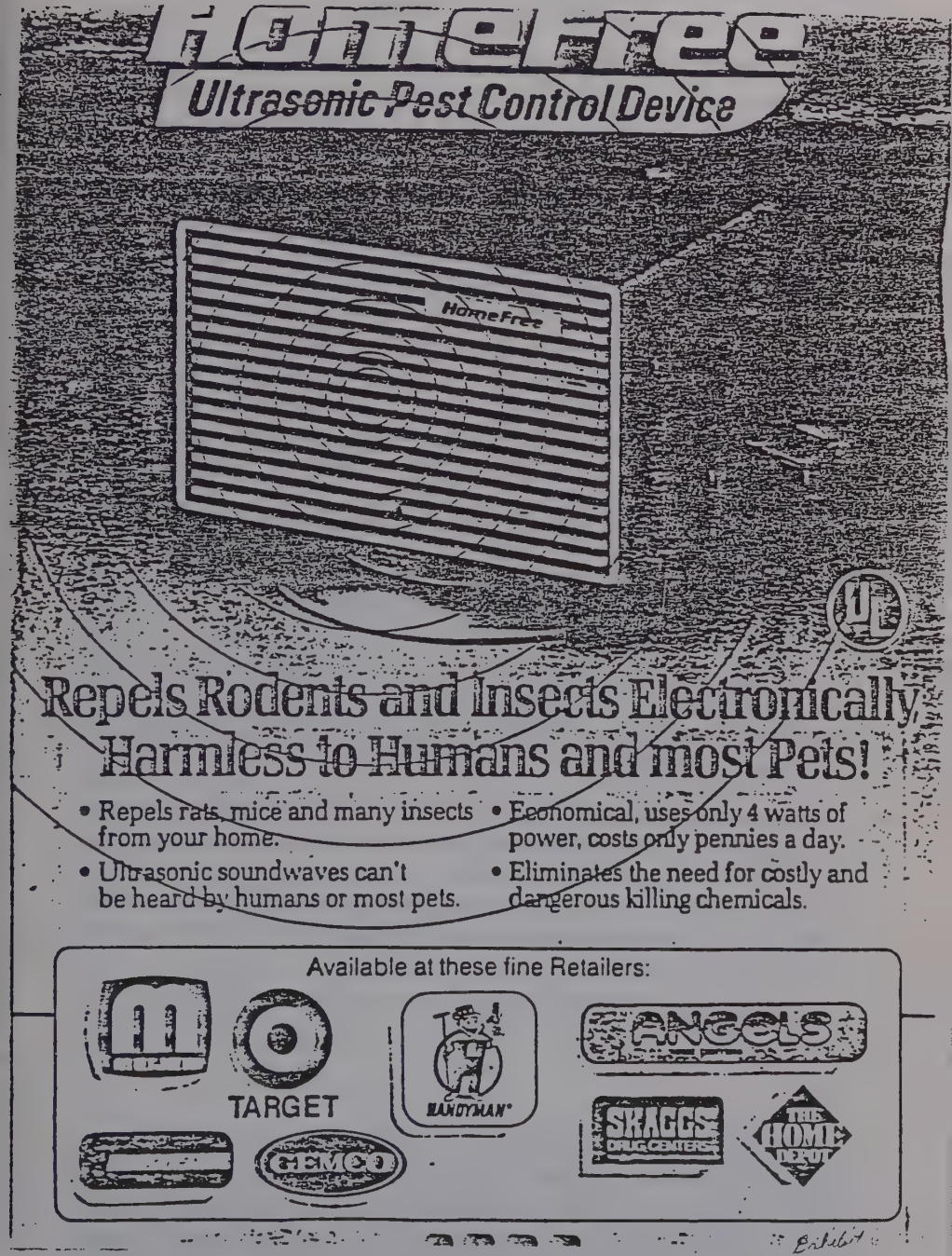
MODEL	DESCRIPTION	PACK	WT.
1600	ULTRA SONIC PEST CONTROL DEVICE	12-inner Display 24-Master Ctn.	9 oz.

SAGA

SAGA INTERNATIONAL INC.
COMPTON, CA 90220

UL

Exhibit J


HomeFree
Ultrasonic Pest Control Device
HomeFree
Repels Rodents and Insects Electronically
Harmless to Humans and most Pets!
• Repels rats, mice and many insects from your home.
• Ultrasonic soundwaves can't be heard by humans or most pets.
• Economical, uses only 4 watts of power, costs only pennies a day.
• Eliminates the need for costly and dangerous killing chemicals.
Available at these fine Retailers:
TARGET
HANDYMAN
ANGELS
SKAGGS DRUG CENTERS
THE HOME DEPOT
KMART

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of the draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and also containing waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of the Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Saga International, Inc., is a California corporation with its offices and principal place of business located at 1220 West Walnut Street, Compton, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent Saga International, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the "Home Free" ultrasonic pest control device or any other ultrasonic pest control product or device in

or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that the Home Free or any other ultrasonic pest control product will:

(1) eliminate cockroaches, rats, mice or other pests from a home or place of business;

(2) eliminate rodents or insects from a home or place of business within four to six weeks, or within any other specified period of time;

(3) protect an area where said product is in use in a home or place of business from rodents or insects, or will cause an area to be free of rodents or insects; or

(4) serve as an effective alternative to the use of conventional products such as sprays, powders, traps or other chemicals in providing protection from insect and rodent infestation.

B. Representing, directly or by implication, any performance characteristic of any ultrasonic pest control product, unless at the time of making such representation respondent possesses and relies upon competent and reliable evidence which substantiates the representation. Evidence in the form of tests, experiments, analyses, research studies, or other evaluations shall be competent and reliable only if they are conducted in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant professions or sciences to yield accurate, reliable, and reproducible results.

C. Representing, directly or by implication, that any ultrasonic pest control product is effective in providing protection from insect or rodent infestation in a home or place of business, unless at the time of making such representation respondent possesses and relies upon competent and reliable evidence which either directly relates to such home or place of business use conditions, or which can properly be applied to such conditions. Evidence in the form of tests, experiments, analyses, research studies, or other evaluations shall be competent and reliable only if they are conducted in an objective manner by persons qualified to do so, using procedure generally accepted in the relevant professions or sciences to yield accurate, reliable, and reproducible results.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, employees, agents and representatives shall provide consumer refunds in accordance with the provisions of this paragraph to any retail purchaser of the Home Free device who purchased the

Home Free device from any retail outlet at any time on or after January 1, 1984.

A. *Notification of Consumers*

1. Respondent shall:

(a) Within sixty (60) days from the date of service of this order, cause to be distributed to each of respondent's distributors, and to each retail outlet which is known by respondent or its distributors to have purchased the Home Free device for resale to the public, the "Notice" set out in Attachment A to this order, to which respondent shall cause to be affixed in tablet format (in sufficient quantities to anticipate foreseeable consumer demand) the form set out in Attachment B to this order;

(b) Within sixty (60) days from the date of service of this order, cause to be disseminated to each retail outlet identified in response to Paragraph II A.1(a), a request that said retail outlet prominently display said "Notice" and tablet forms;

(c) Within sixty (60) days from the date of service of this order, as to those retail outlets which together have accounted for at least 75% of respondent's sales of the Home Free device, take all steps necessary to cause said "Notices" to be placed in public areas within each such retail outlet where such "Notices" are most likely to be seen by customers, particularly past purchasers of the Home Free device; and take all steps necessary to cause such "Notices" to remain in said public areas for a continuous period of six months from the date on which such "Notices" are first placed in each such retail outlet; and

(d) Within ninety (90) days from the date of service of this order, but no sooner than respondent has complied with the provisions of Paragraphs II.A.1.(a), (b) and (c), cause to be published, clearly and prominently, the text of the "Notice" set out in Attachment A of this order, in display advertising format in the weekend or Sunday edition of each local newspaper in which each retailer identified in Paragraph II.A.1.(c) regularly advertises.

2. The "Notice" referred to in Paragraph II.A.1. above shall consist of a free standing sign of mounted wall poster of at least (8-½ by 11 inches) in dimension, on which is written, *verbatim,* in clear and prominent print of no less than 24 point print, the text as shown in Attachment A to this order.

3. Respondent shall, within ninety (90) days from the date of service of this order, cause to be published the text of the "Notice" set out in Attachment A to this order in each market area in which respondents caused newspaper, magazine, radio, or television advertisements for the Home Free to be placed at any time from January 1, 1983 to the

date of service of this order. The text of the "Notice" shall be published in a clear and prominent form in display advertising format in the newspaper of greatest general circulation in the market area in which each such advertisement appeared.

B. *Consumer Refund Procedures*

1. Any purchaser of the Home Free shall be entitled to a refund in accordance with the provisions of this order upon: (a) return of a Home Free device to any retailer who has sold the Home Free on or after January 1, 1984, *and* submission of either a sales receipt for the device issued by that retailer and dated on or after January 1, 1984, or a signed "affidavit" (as hereinafter defined and described); Or (b) shipment of the Home Free device to respondent with either a sales receipt for purchase of the device issued by a retailer and dated on or after January 1, 1984, or a signed "affidavit" (as hereinafter defined and described).

2. The "affidavit" referred to in Paragraph II.B.1. shall consist of either: (a) the form affixed in tablet format to the Notices furnished to all retailers in accordance with paragraph II.A.1.(a) above, or (b) at the discretion of the person claiming the refund, a substantially equivalent written and signed statement.

3. Where a consumer returns the purchased Home Free device(s) to respondent or to a participating retailer for refund(s), and the claim for refund is accompanied by some statement other than the affidavit form referred to herein (as permitted by Paragraph II.B.2.(b) above), and respondent or a participating retailer rejects the alternate statement as not "substantially equivalent" to the affidavit, respondent shall immediately provide the consumer, or shall cause the consumer to be provided, with an affidavit form so that the consumer may promptly obtain the refund to which the consumer is entitled under the provisions of this order.

C. *Respondent's Consumer Redress Obligations*

Respondent or its successors or assigns shall: (1) cause consumer refunds to be made by retailers to any purchaser of the Home Free device who returns the device and submits to the retailer either (a) a sales receipt issued by a retailer and dated on or after January 1, 1984, or (b) a signed affidavit (or its equivalent) as described in Paragraph II.B.2. above; and (2) make direct consumer refunds, including the cost of postage, to any purchaser of the Home Free device who returns the device and submits either (a) a sales receipt issued by the retailer and dated on or after January 1, 1984, or (b) a signed affidavit (or its equivalent) as described in Paragraph II.B.2. above. Any claim in compliance with Part II of this order shall be valid if made within

one calendar year of the date of service of this order and, when made directly to respondent, shall be honored by respondent within thirty (30) days of receipt of the claim.

D. *Amount of Individual Refund*

Any consumer shall be entitled to a refund of the full amount of the purchase price paid for each Home Free device purchased as proven by a sales receipt issued by a retailer. In the absence of such a receipt, consumers shall be entitled to a refund of no more than $19.95 plus postage if the device has been shipped to respondent at the consumer's expense.

E. *Respondent's Reporting Requirements*

Respondent shall report to the Federal Trade Commission the status of the consumer redress program required by this agreement in accordance with the following schedule:

(1) One hundred and twenty (120) days from the date of service of this order, respondent shall advise the Commission, in writing, of the number and location (by retail establishment address) of notices placed as required by Paragraph II.A.1. of this agreement and shall provide the Commission with a sample of each advertisement caused by respondent to be disseminated in accordance with the provisions of Paragraphs II.A.1.(d) and II.A.3. of this order, along with the schedule of publication of such advertisements; and

(2) Fifteen (15) months from the date of service of this order, respondent shall provide the Commission with a summary report of the consumer redress program which shall include, but shall not necessarily be limited to, a tabulation, on a total cumulative basis, of the number of former purchasers of the Home Free who have claimed a refund as authorized by this agreement, the dollar amount of consumer refunds given (either by respondent directly or by retailers), and the number, name, and last known address of each claimant, if any, whose claim for refund has been denied by respondent.

F. *Respondent's Record-Keeping Requirements*

Respondent shall for at least two (2) years after service of this order, maintain and upon requests make available to the Federal Trade Commission at a place it designates for inspection and copying, sufficient records to identify:

(1) The name and last known address of each purchaser of the Home Free who received reimbursement and the amount of such reimbursement; and

(2) The name and last known address of each purchaser of the Home

Free who requested reimbursement and was refused, and the reason for each refusal to reimburse.

III.

It is further ordered, That for a period of three (3) years after the last date of dissemination of any representation concerning the performance characteristics or efficacy of any product covered by this order, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of all materials relied upon to substantiate such representation, and copies of all documents in respondent's possession that contradict, qualify, or otherwise call into question said representation, including complaints from consumers.

IV.

It is further ordered, That respondent shall for a period of three (3) years distribute, or cause to be distributed, a copy of this order to all present and future managerial employees, distributors, independent sales agents, and former, present, and future direct purchasers from respondent of any product covered by this order.

V.

It is further ordered, That for a period of ten years:

A. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent that may affect compliance obligations arising out of this order, such as dissolution, assignment of the ultrasonic pest control business, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

VI.

It is further ordered, That respondent shall, within one-hundred and twenty (120) days after service upon it if this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

ATTACHMENT A

REFUND ANNOUNCEMENT
FOR PURCHASERS OF THE

"HOME FREE" PEST CONTROL DEVICE

UNDER THE TERMS OF A FEDERAL TRADE COMMISSION ORDER, YOU ARE ENTITLED TO A REFUND FOR ANY "HOME FREE" PEST CONTROL DEVICE BOUGHT ON OR AFTER JANUARY 1, 1984, UPON RETURN OF THE PRODUCT AT ANY TIME UNTIL [Date to Be Supplied: One Year From Date of Service of Order by Commission Upon Respondent]. THE FEDERAL TRADE COMMISSION HAS CHARGED THAT SUCH DEVICES ARE NOT EFFECTIVE FOR THE PURPOSES ADVERTISED. SEE YOUR RETAILER ABOUT OBTAINING THE REFUND OR CALL 1–800–624–3083 (if you are in California) or 1–800–344–4522 (if you are outside of California).

ATTACHMENT B

STATEMENT OF PURCHASE

TO OBTAIN A REFUND FROM A PARTICIPATING RETAILER, YOU MUST RETURN THE "HOME FREE" TO THE RETAILER AND SUBMIT EITHER (1) A DATED SALES RECEIPT OR (2) THIS FORM, COMPLETED AND SIGNED.

I purchased a HOME FREE pest control device from

_____ on or after

January 1, 1984. Name of Retailer

On penalty of perjury I certify that all of the above information is true and correct to the best of my knowledge. (See *28 United States Code §1746 (1985).*

_____ _____

Date Signature

_____

_____

Address

IF YOUR RETAILER IS NOT A PARTICIPATING RETAILER, OR YOU ARE UNABLE TO OBTAIN A REFUND FROM THE RETAILER FOR ANY REASON, YOU MAY OBTAIN A REFUND FROM THE MANUFACTURER BY SUBMITTING A DATED SALES RECEIPT OR THIS FORM (COMPLETED AND SIGNED) *AND* SHIPPING THE HOME FREE TO: 2055 University Drive, Compton, CA 90220, ATTN: Customer Service Department. YOU MAY SHIP THE DEVICE C.O.D. OR THE MANUFACTURER WILL REIMBURSE YOU FOR THE COST OF SHIPMENT. EACH REFUND FOR A HOME FREE PURCHASE IS LIMITED TO $19.95 UNLESS YOU SUBMIT A SALES RECEIPT SHOWING YOU PAID A HIGHER PRICE.

IN THE MATTER OF

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3197. Complaint, Aug. 25, 1986—Decision, Aug. 25, 1986

This consent order, among other things, prohibits a New York City-based insurance agent association from encouraging its members to refuse to deal with companies based on the companies' sales policies.

Appearances

For the Commission: *Michael E. Antalics.*

For the respondent: *Mark F. Horning, Steptoe & Johnson,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

Definition

PARAGRAPH 1. For purposes of this complaint, the term *direct marketing* shall mean attempts by insurance companies to sell insurance directly to consumers, together with any other insurance company actions—including but not limited to attempts by insurance companies to acquire or obtain a controlling interest in an independent agency, attempts by insurance companies to obtain exclusive agency agreements with independent agents or agencies, or other insurance company efforts to limit the independent agent's role in counselling insureds, servicing accounts, or controlling expirations—to facilitate the sale of insurance directly to consumers.

Respondent

PAR. 2. Respondent Independent Insurance Agents of America, Inc. is a corporation organized and existing under the laws of the State of

New York, with its mailing address at 100 Church Street, New York, New York.

PAR. 3. Respondent is a national trade association established to promote and represent the common business interests of its members. Respondent operates in substantial part for the economic benefit of its members and is a corporation within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 4. Members of respondent are engaged in the business of marketing property and casualty insurance for insurance companies. Members of respondent are not employees of the insurance companies they represent, and members typically represent more than one insurance company.

Jurisdiction

PAR. 5. In the course of their businesses, members of respondent receive substantial sums of money as commissions for the writing of insurance policies for the insurance companies they represent, which money flows across state lines. Respondent, communicating with its members throughout the United States, utilizes telephonic and mail communications which flow across state lines. The acts and practices described herein are in interstate commerce, or affect the interstate activities of respondent's members, insurance companies, and consumers who purchase insurance, and are in or affecting commerce within the meaning of the Federal Trade Commission Act.

PAR. 6. The anticompetitive acts and practices alleged herein constitute an "agreement to boycott, coerce, or intimidate" or an "act of boycott, coercion, or intimidation" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1013(b).

Competition in the Sale of Insurance

PAR. 7. Property and casualty insurance is marketed to consumers through a variety of channels. Certain insurance companies employ sales personnel; others use independent agents; and some use both employees and independent agents. When a company uses employees to market coverages similar to those marketed through independent agents, the employees, in effect, compete with independent agents for policy sales.

PAR. 8. Certain insurance companies that have traditionally used independent agents have begun to experiment with direct marketing approaches to reduce costs and achieve operating efficiencies in the sale of policies to consumers. The Hartford Insurance Company, for example, developed a direct marketing program under which it would provide coverage to members of the American Association of Retired Persons, an organization to which many elderly Americans belong.

Anticompetitive Acts and Practices

PAR. 9. Respondent, acting as a conspiracy of at least some of its members or by combining or conspiring with some of its members, has undertaken acts to frustrate or deter insurance companies in their efforts to develop and implement direct marketing programs. Among other things, respondent has combined or conspired, through or with its members, to engage in threatened or actual refusals to deal with insurance companies that have proposed or adopted direct marketing programs.

PAR. 10. In furtherance of this combination or conspiracy, respondent, through or with its members, has engaged in various acts and practices, including among other things:

a. recommending, inducing, encouraging, urging or advising association members, through speeches and other means, to refuse to deal with insurance companies that have proposed or adopted direct marketing programs that compete with the sales efforts of independent agents; and

b. collecting and disseminating information on actual or threatened refusals to deal by independent insurance agents to coerce insurance companies that have proposed or adopted direct marketing programs that compete with the sales efforts of independent agents.

Anticompetitive Effects

PAR. 11. The purposes or effects, and the tendency and capacity, of the combination or conspiracy and acts or practices of respondent as described in Paragraphs Nine and Ten above have been and are to unreasonably restrain competition and injure consumers in one or more of the following ways, among others:

a. insurance companies have been or are likely to be frustrated or deterred in their efforts to reduce costs, achieve efficiencies, and provide consumers with alternatives to purchasing insurance through independent agents;

b. consumers have been deprived of the benefits of competition among sellers of insurance, including the availability of insurance policies marketed directly by insurance companies; and

c. competition among marketers of insurance has been or is likely to be adversely affected.

PAR. 12. The combination or conspiracy and the acts and practices alleged herein constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. This combination or

conspiracy is continuing and will continue unless the Commission enters appropriate relief against respondent.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a complaint which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended; and

Respondent, Independent Insurance Agents of America, Inc. ("respondent"), its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the amended complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and
2. The proceeding is in the public interest.

Order

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *IIAA* means Independent Insurance Agents of America, Inc., its officers, employees, directors, committee and task force members, its successors and assigns;

B. *Independent insurance agents* means persons who are engaged in the business of selling insurance as agents for insurance companies and who are not employees of such insurance companies; and

C. *Direct marketing* means attempts by insurance companies to sell insurance directly to consumers, together with any other insurance company actions—including but not limited to attempts by insurance companies to acquire or obtain a controlling interest in an independent agency, attempts by insurance companies to obtain exclusive agency agreements with independent agents or agencies, or other insurance company efforts to limit the independent agent's role in counselling insureds, servicing accounts, or controlling expirations—to facilitate the sale of insurance directly to consumers.

II.

It is further ordered, That IIAA, individually or in concert with any other person, directly or indirectly, or through any corporate or other device, in connection with IIAA's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

A. Requesting, requiring, advocating, advising, recommending, or publishing statements that recommend that independent insurance agents cancel agency contracts with, permanently or temporarily transfer or withhold business from, or otherwise refuse to deal with, any insurance company because of any direct marketing methods, practices or policies chosen by that company;

B. Coercing, compelling, inducing, or intimidating by means of threatened refusals to deal, or attempting to coerce, compel, induce, or intimidate by means of threatened refusals to deal, any insurance company into (1) abandoning or refraining from adopting any direct marketing method, practice or policy; or (2) adopting or continuing any method, practice or policy of selling insurance through independent insurance agents;

C. Publishing or circulating surveys or other information on actual or threatened refusals to deal by independent insurance agents with any insurance company because of that company's direct marketing methods, practices or policies; or

D. Aiding or assisting any affiliate of IIAA or any member of IIAA in engaging in any of the acts prohibited by this Part II.

III.

It is further ordered, That the provisions of Part II of this order shall not be construed to prevent IIAA from: (1) participating, in good faith, in any legislative, judicial or administrative proceedings; (2) providing information or views to any insurance company or insurance compa-

ny trade group; (3) providing factual information to its members; or (4) adopting policy statements or expressing views on subjects relevant to the direct marketing of insurance, provided that none of the above enumerated actions are undertaken to invite, initiate, encourage, or facilitate any actual or threatened refusal to deal.

IV.

It is further ordered, That IIAA shall:

A. At the first regularly-scheduled meeting of the IIAA National Board of Directors, but in no event later than 120 days after this order becomes final, repeal the Dual Marketing Task Force report;

B. Within sixty days from the date this order becomes final, mail a copy of this order, and a letter specifying any changes made pursuant to Paragraph A of this Part, to every IIAA state affiliate; and

C. Within sixty days from the date this order becomes final and annually thereafter for three years, in the first issue following the anniversary date of this order, publish this order in *Independent Agent* in the same type size normally used for articles that are published in *Independent Agent.*

V.

It is further ordered, That IIAA shall:

A. Within ninety days from the date this order becomes final, file a written report with the Commission, setting forth in detail the manner and form in which it has complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission may, by written notice to IIAA, require;

B. For a period of three years from the date this order becomes final, maintain in its files for a period of three years a copy of all correspondence referring or relating to the direct marketing of insurance, and received from, or sent to, insurance companies, independent insurance agents, or IIAA affiliates or members, and make such copies available for inspection by representatives of the Federal Trade Commission upon written request; and

C. Notify the Commission at least thirty days prior to any proposed change in IIAA's organization or operations, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change which may affect compliance with this order.

IN THE MATTER OF

INDEPENDENT INSURANCE AGENTS AND BROKERS OF CALIFORNIA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3198. Complaint, Aug. 25, 1986—Decision, Aug. 25, 1986

This consent order, among other things, prohibits a San Francisco-based insurance agent association from encouraging its members to take action against insurance companies who use direct marketing.

Appearances

For the Commission: *Michael E. Antalics.*

For the respondent: *Mark F. Horning, Steptoe & Johnson,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

Definition

PARAGRAPH 1. For purposes of this complaint, the term *direct marketing* shall mean attempts by insurance companies to sell insurance directly to consumers, together with any other insurance company actions—including but not limited to attempts by insurance companies to acquire or obtain a controlling interest in an independent agency, attempts by insurance companies to obtain exclusive agency agreements with independent agents or agencies, or other insurance company efforts to limit the independent agent's role in counselling insureds, servicing accounts, or controlling expirations—to facilitate the sale of insurance directly to consumers.

Respondent

PAR. 2. Respondent Independent Insurance Agents and Brokers of California, Inc. is a corporation organized and existing under the laws of the State of California, with its mailing address at 465 California Street, Suite 600, San Francisco, California.

PAR. 3. Respondent is a trade association established to promote and represent the common business interests of its members. Respondent operates in substantial part for the economic benefit of its members and is a corporation within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 4. Members of respondent are engaged in the business of marketing property and casualty insurance for insurance companies. Members of respondent are not employees of the insurance companies they represent, and members typically represent more than one insurance company.

Jurisdiction

PAR. 5. In the course of their businesses, members of respondent receive substantial sums of money as commissions for the writing of insurance policies for the insurance companies they represent, which money flows across state lines. The acts and practices described herein are in interstate commerce, or affect the interstate activities of respondent's members, insurance companies, and consumers who purchase insurance, and are in or affecting commerce within the meaning of the Federal Trade Commission Act.

PAR. 6. The anticompetitive acts and practices alleged herein constitute an "agreement to boycott, coerce, or intimidate" or an "act of boycott, coercion, or intimidation" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1013(b).

Competition in the Sale of Insurance

PAR. 7. Property and casualty insurance is marketed to consumers through a variety of channels. Certain insurance companies employ sales personnel; others use independent agents; and some use both employees and independent agents. When a company uses employees to market coverages similar to those marketed through independent agents, the employees, in effect, compete with independent agents for policy sales.

PAR. 8. Certain insurance companies that have traditionally used independent agents have begun to experiment with direct marketing approaches to reduce costs and achieve operating efficiencies in the sale of policies to consumers. Reliance Insurance Company, for example, through its United Pacific Insurance Company subsidiary, devel-

oped a direct marketing program under which it would provide low priced insurance coverage to policyholders based on reduced costs and operating efficiencies.

Anticompetitive Acts and Practices

PAR. 9. Respondent, acting as a conspiracy of at least some of its members or by combining or conspiring with some of its members, has undertaken acts to frustrate or deter insurance companies in their efforts to develop and implement direct marketing programs. Among other things, respondent has combined or conspired, through or with its members, to engage in threatened or actual refusals to deal with insurance companies that have proposed or adopted direct marketing programs.

PAR. 10. In furtherance of this combination or conspiracy, respondent, through or with its members, has engaged in various acts and practices, including among other things:

a. recommending, inducing, encouraging, urging or advising association members, through speeches and other means, to refuse to deal with insurance companies that have proposed or adopted direct marketing programs that compete with the sales efforts of independent agents; and

b. collecting and disseminating information on actual or threatened refusals to deal by independent insurance agents to coerce insurance companies that have proposed or adopted direct marketing programs that compete with the sales efforts of independent agents.

Anticompetitive Effects

PAR. 11. The purposes or effects, and the tendency and capacity, of the combination or conspiracy and acts or practices of respondent as described in Paragraphs Nine and Ten above have been and are to unreasonably restrain competition and injure consumers in one or more of the following ways, among others:

a. insurance companies have been or are likely to be frustrated or deterred in their efforts to reduce costs, achieve efficiencies, and provide consumers with alternatives to purchasing insurance through independent agents;

b. consumers have been deprived of the benefits of competition among sellers of insurance, including the availability of insurance policies marketed directly by insurance companies; and

c. competition among marketers of insurance has been or is likely to be adversely affected.

PAR. 12. The combination or conspiracy and the acts and practices alleged herein constitute unfair methods of competition or unfair or

deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. This combination or conspiracy is continuing and will continue unless the Commission enters appropriate relief against respondent.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a complaint which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended; and

Respondent, Independent Insurance Agents and Brokers of California, Inc. ("respondent"), its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the amended complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and

2. The proceeding is in the public interest.

Order

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *IIABC* means Independent Insurance Agents and Brokers of California, Inc., its officers, employees, directors, committee and task force members, its successors and assigns;

B. *Independent insurance agents* means persons who are engaged in

the business of selling insurance as agents for insurance companies and who are not employees of such insurance companies; and

C. *Direct marketing* means attempts by insurance companies to sell insurance directly to consumers, together with any other insurance company actions—including but not limited to attempts by insurance companies to acquire or obtain a controlling interest in an independent agency, attempts by insurance companies to obtain exclusive agency agreements with independent agents or agencies, or other insurance company efforts to limit the independent agent's role in counselling insureds, servicing accounts, or controlling expirations—to facilitate the sale of insurance directly to consumers.

II.

It is further ordered, That IIABC, individually or in concert with any other person, directly or indirectly, or through any corporate or other device, in connection with IIABC's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

A. Requesting, requiring, advocating, advising, recommending, or publishing statements that recommend that independent insurance agents cancel agency contracts with, permanently or temporarily transfer or withhold business from, or otherwise refuse to deal with, any insurance company because of any direct marketing methods, practices or policies chosen by that company;

B. Coercing, compelling, inducing, or intimidating by means of threatened refusals to deal, or attempting to coerce, compel, induce, or intimidate by means of threatened refusals to deal, any insurance company into (1) abandoning or refraining from adopting any direct marketing method, practice or policy; or (2) adopting or continuing any method, practice or policy of selling insurance through independent insurance agents;

C. Publishing or circulating surveys or other information on actual or threatened refusals to deal by independent insurance agents with any insurance company because of that company's direct marketing methods, practices or policies; or

D. Aiding or assisting any affiliate of IIABC or any member of IIABC in engaging in any of the acts prohibited by this Part II.

III.

It is further ordered, That the provisions of Part II of this order shall not be construed to prevent IIABC from: (1) participating, in good

faith, in any legislative, judicial or administrative proceedings; (2) providing information or views to any insurance company or insurance company trade group; (3) providing factual information to its members; or (4) adopting policy statements or expressing views on subjects relevant to the direct marketing of insurance, provided that none of the above enumerated actions are undertaken to invite, initiate, encourage, or facilitate any actual or threatened refusal to deal.

IV.

It is further ordered, That IIABC shall:

A. Within sixty days from the date this order becomes final, mail a copy of this order, to every IIABC local affiliate; and

B. Within sixty days from the date this order becomes final and annually thereafter for three years, in the first issue following the anniversary date of this order, publish this order in *NEWS 'N VIEWS* in the same type size normally used for articles that are published in *NEWS 'N VIEWS.*

V.

It is further ordered, That IIABC shall:

A. Within ninety days from the date this order becomes final, file a written report with the Commission, setting forth in detail the manner and form in which it has complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission may, by written notice to IIABC, require;

B. For a period of three years from the date this order becomes final, maintain in its files for a period of three years a copy of all correspondence referring or relating to the direct marketing of insurance, and received from, or sent to, insurance companies, independent insurance agents, or IIABC affiliates or members, and make such copies available for inspection by representatives of the Federal Trade Commission upon written request; and

C. Notify the Commission at least thirty days prior to any proposed change in IIABC's organization or operations, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change which may affect compliance with this order.

IN THE MATTER OF

INDEPENDENT INSURANCE AGENTS ASSOCIATION OF MONTANA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3199. Complaint, Aug. 25, 1986—Decision, Aug. 25, 1986

This consent order, among other things, prohibits a Helena, Montana-based insurance agent association from encouraging its members to refuse to deal with companies based on the companies' sales policies.

Appearances

For the Commission: *Michael E. Antalics.*

For the respondent: *Mark F. Horning, Steptoe & Johnson,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

Definition

PARAGRAPH 1. For purposes of this complaint, the term *direct marketing* shall mean attempts by insurance companies to sell insurance directly to consumers, together with any other insurance company actions—including but not limited to attempts by insurance companies to acquire or obtain a controlling interest in an independent agency, attempts by insurance companies to obtain exclusive agency agreements with independent agents or agencies, or other insurance company efforts to limit the independent agent's role in counselling insureds, servicing accounts, or controlling expirations—to facilitate the sale of insurance directly to consumers.

Respondent

PAR. 2. Respondent Independent Insurance Agents Association of Montana, Inc. is a corporation organized and existing under the laws of the State of Montana, with its mailing address at P.O. Box 5593, Helena, Montana.

PAR. 3. Respondent is a trade association established to promote and represent the common business interests of its members. Respondent operates in substantial part for the economic benefit of its members and is a corporation within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 4. Members of respondent are engaged in the business of marketing property and casualty insurance for insurance companies. Members of respondent are not employees of the insurance companies they represent, and members typically represent more than one insurance company.

Jurisdiction

PAR. 5. In the course of their businesses, members of respondent receive substantial sums of money as commissions for the writing of insurance policies for the insurance companies they represent, which money flows across state lines. The acts and practices described herein are in interstate commerce, or affect the interstate activities of respondent's members, insurance companies, and consumers who purchase insurance, and are in or affecting commerce within the meaning of the Federal Trade Commission Act.

PAR. 6. The anticompetitive acts and practices alleged herein constitute an "agreement to boycott, coerce, or intimidate" or an "act of boycott, coercion, or intimidation" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1013(b).

Competition in the Sale Of Insurance

PAR. 7. Property and casualty insurance is marketed to consumers through a variety of channels. Certain insurance companies employ sales personnel; others use independent agents; and some use both employees and independent agents. When a company uses employees to market coverages similar to those marketed through independent agents, the employees, in effect, compete with independent agents for policy sales.

PAR. 8. Certain insurance companies that have traditionally used independent agents have begun to experiment with direct marketing approaches to reduce costs and achieve operating efficiencies in the sale of policies to consumers. The Hartford Insurance Company, for example, developed a direct marketing program under which it would

provide coverage to members of the American Association of Retired Persons, an organization to which many elderly Americans belong.

Anticompetitive Acts And Practices

PAR. 9. Respondent, acting as a conspiracy of at least some of its members or by combining or conspiring with some of its members, has undertaken acts to frustrate or deter insurance companies in their efforts to develop and implement direct marketing programs. Among other things, respondent has combined or conspired, through or with its members, to engage in threatened or actual refusals to deal with insurance companies that have proposed or adopted direct marketing programs.

PAR. 10. In furtherance of this combination or conspiracy, respondent, through or with its members, has engaged in various acts and practices, including among other things:

a. recommending, inducing, encouraging, urging or advising association members, through speeches and other means, to refuse to deal with insurance companies that have proposed or adopted direct marketing programs that compete with the sales efforts of independent agents; and

b. collecting and disseminating information on actual or threatened refusals to deal by independent insurance agents to coerce insurance companies that have proposed or adopted direct marketing programs that compete with the sales efforts of independent agents.

Anticompetitive Effects

PAR. 11. The purposes or effects, and the tendency and capacity, of the combination or conspiracy and acts or practices of respondent as described in Paragraphs Nine and Ten above have been and are to unreasonably restrain competition and injure consumers in one or more of the following ways, among others:

a. insurance companies have been or are likely to be frustrated or deterred in their efforts to reduce costs, achieve efficiencies, and provide consumers with alternatives to purchasing insurance through independent agents;

b. consumers have been deprived of the benefits of competition among sellers of insurance, including the availability of insurance policies marketed directly by insurance companies; and

c. competition among marketers of insurance has been or is likely to be adversely affected.

PAR. 12. The combination or conspiracy and the acts and practices alleged herein constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of

Section 5 of the Federal Trade Commission Act. This combination or conspiracy is continuing and will continue unless the Commission enters appropriate relief against respondent.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a complaint which, if issued by the Commission would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended; and

Respondent, Independent Insurance Agents Association of Montana, Inc. ("respondent"), its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the amended complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and

2. The proceeding is in the public interest.

Order

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *IIAAM* means Independent Insurance Agents Association of Montana, Inc., its officers, employees, directors, committee and task force members, its successors and assigns;

B. *Independent insurance agents* means persons who are engaged in

the business of selling insurance as agents for insurance companies and who are not employees of such insurance companies; and

C. *Direct marketing* means attempts by insurance companies to sell insurance directly to consumers, together with any other insurance company actions—including but not limited to attempts by insurance companies to acquire or obtain a controlling interest in an independent agency, attempts by insurance companies to obtain exclusive agency agreements with independent agents or agencies, or other insurance company efforts to limit the independent agent's role in counselling insureds, servicing accounts, or controlling expirations—to facilitate the sale of insurance directly to consumers.

II.

It is further ordered, That IIAAM, individually or in concert with any other person, directly or indirectly, or through any corporate or other device, in connection with IIAAM's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

A. Requesting, requiring, advocating, advising, recommending, or publishing statements that recommend that independent insurance agents cancel agency contracts with, permanently or temporarily transfer or withhold business from, or otherwise refuse to deal with, any insurance company because of any direct marketing methods, practices or policies chosen by that company;

B. Coercing, compelling, inducing, or intimidating by means of threatened refusals to deal, or attempting to coerce, compel, induce, or intimidate by means of threatened refusals to deal, any insurance company into (1) abandoning or refraining from adopting any direct marketing method, practice or policy; or (2) adopting or continuing any method, practice or policy of selling insurance through independent insurance agents;

C. Publishing or circulating surveys or other information on actual or threatened refusals to deal by independent insurance agents with any insurance company because of that company's direct marketing methods, practices or policies; or

D. Aiding or assisting any affiliate of IIAAM or any member of IIAAM in engaging in any of the acts prohibited by this Part II.

III.

It is further ordered, That the provisions of Part II of this order shall not be construed to prevent IIAAM from: (1) participating, in good

faith, in any legislative, judicial or administrative proceedings; (2) providing information or views to any insurance company or insurance company trade group; (3) providing factual information to its members; or (4) adopting policy statements or expressing views on subjects relevant to the direct marketing of insurance, provided that none of the above enumerated actions are undertaken to invite, initiate, encourage, or facilitate any actual or threatened refusal to deal.

IV.

It is further ordered, That IIAAM shall:

A. Within sixty days from the date this order becomes final, mail a copy of this order, to every IIAAM local affiliate; and

B. Within sixty days from the date this order becomes final and annually thereafter for three years, in the first issue following the anniversary date of this order, publish this order in *Montana TAGS* in the same type size normally used for articles that are published in *Montana TAGS.*

V.

It is further ordered, That IIAAM shall:

A. Within ninety days from the date this order becomes final, file a written report with the Commission, setting forth in detail the manner and form in which it has complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission may, by written notice to IIAAM, require;

B. For a period of three years from the date this order becomes final, maintain in its files for a period of three years a copy of all correspondence referring or relating to the direct marketing of insurance, and received from, or sent to, insurance companies, independent insurance agents, or IIAAM affiliates or members, and make such copies available for inspection by representatives of the Federal Trade Commission upon written request; and

C. Notify the Commission at least thirty days prior to any proposed change in IIAAM's organization or operations, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change which may affect compliance with this order.

IN THE MATTER OF

WARNER COMMUNICATIONS INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON ACTS

Docket 9174. Complaint, March 19, 1984—Decision, Sept. 8, 1986

This consent order requires, among other things, a New York City record company to obtain prior FTC approval before acquiring any interest in major record companies and to notify the FTC about distribution agreements planned with those companies.

Appearances

For the Commission: *Robert W. Doyle, Jr.* and *Richard Malatt.*

For the respondents: *Stuart Robinowitz* and *Martin Flumenbaum, Paul, Weiss, Rifkind, Wharton & Garrison,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents, Warner Communications Inc., Warner Bros. Records, Inc., (collectively "Warner"), Chappell & Co., Inc., and PolyGram Records, Inc. (collectively "PolyGram"), subject to the jurisdiction of the Commission, have agreed to a merger of each firm's prerecorded music businesses that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITION

1. For the purposes of this complaint, *prerecorded music* refers to music sold to consumers in the form of records (singles, LPs, and compact discs) and tapes (cassettes, 8-track cartridges, and reel-to-reel tapes).

II. WARNER COMMUNICATIONS INC. AND WARNER BROS. RECORDS, INC.

2. Respondent Warner Communications Inc. is a Delaware corporation with its principal place of business in New York, New York. Warner Communications Inc. is a worldwide entertainment firm with interests in prerecorded music, pay television, motion pictures, consumer electronics and publishing. In 1982 it had revenues of about $4 billion and a profit of $257.8 million.

3. Warner Communications Inc. is the owner of all the outstanding shares of Warner Bros. Records, Inc.

4. Warner Bros. Records, Inc. is a Delaware corporation with its principal place of business in New York, New York. It is a wholly owned subsidiary of Warner Communications Inc., and one of several Warner Communications' domestic companies involved in the prerecorded music business.

III. CHAPPELL & CO. AND POLYGRAM RECORDS, INC.

5. Chappell & Co. and PolyGram Records, Inc. are part of a collection of domestic and foreign corporations known as the "PolyGram Group," which is a joint venture of the N.V. Philips Gloeilampenfabrieken ("Philips") of the Netherlands and Siemens, AG of West Germany. Both Chappell & Co. and PolyGram Records, Inc. are corporations organized and existing under the laws of the State of Delaware with their corporate headquarters located in New York, New York.

6. PolyGram Records, Inc. is currently the PolyGram Group's principal organization for its U.S. prerecorded music operations. The PolyGram Group had worldwide prerecorded music sales in 1982 of about $1 billion, with gross sales exceeding $150 million in the United States.

IV. JURISDICTION

7. At all times relevant herein, each of the companies named in this complaint has been engaged in activities that are in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE PROPOSED MERGER

8. Warner and PolyGram have agreed to merge their prerecorded music businesses in the U.S. and in the rest of the world. In the United States, Warner will transfer its prerecorded music assets to respondent Warner Bros. Records, Inc. PolyGram will transfer its prerecord-

ed music business to respondent Chappell & Co. These two corporations will then merge, and the surviving corporation, Warner-PolyGram, Inc., will then issue new stock: 80 class A shares to Warner; 13 class B shares to PolyGram's shareholder, PolyGram B.V. and 7 class B shares to PolyGram's shareholder, PolyGram GmbH. Warner will also receive 65 shares (representing $65 million principal amount) of Non-Voting 9 percent preferred shares.

9. Warner and PolyGram's parent, Philips, also plan to merge their prerecorded music businesses in the rest of the world.

VI. TRADE OF COMMERCE

10. The relevant product market in which to assess the competitive effects of the merger is the market for prerecorded music.

11. The relevant geographic market in which to assess the competitive effects of the merger is the United States.

12. The relevant market is moderately concentrated.

13. Barriers to entry into the distribution of the relevant product are substantial.

14. Both Warner and PolyGram are substantial competitors in the relevant product and geographic markets.

VII. EFFECTS OF THE MERGER

15. The effect of the proposed merger, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), inasmuch as it will, among other things, result in all of the following:

(a) Eliminate substantial actual competition between Warner and PolyGram in the relevant market;

(b) Eliminate substantial potential competition between Warner and PolyGram;

(c) Eliminate substantial actual and potential competition between the other companies engaged in the distribution of the relevant product; and

(d) Significantly increase the level of industry concentration in the relevant market.

VIII. VIOLATIONS CHARGED

16. The proposed merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

Decision and Order

The Commission having heretofore issued its complaint charging the respondents Warner Communications Inc. and Warner Bros. Records, Inc. with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondents Warner Communications Inc. and Warner Bros. Records, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware, with offices and principal places of business located at 75 Rockefeller Plaza, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

Definitions

Warner, as used herein, means Warner Communications Inc., Warner Bros. Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns, and the officers, directors, employees, or agents of their parents, divisions, subsidiaries, successors and assigns.

PolyGram, as used herein, means Chappell & Co., Inc., PolyGram

Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns and the officers, directors, employees or agents of their parents, divisions, subsidiaries, successors and assigns.

Major record company, as used herein, means the following record companies that are vertically integrated into the creation and national distribution of prerecorded music: Warner, PolyGram, CBS Inc., Capitol Records Inc., RCA Corporation and MCA Corporation.

Distribution Agreement, as used herein, means a contractual arrangement whereby one major record company undertakes to distribute nationally prerecorded music for another major record company, as defined herein, to prerecorded music retailers, one-stops, rack jobbers or other subdistributors for resale. *Distribution Agreement* shall not include an arrangement by which a major record company licenses particular tracks of an artist's music to another record company for the purpose of making so-called *compilation albums.*

Effective date, as used herein, means the date on which the agreement containing consent order between respondents and counsel for the Commission was executed.

I.

It is ordered, That Warner terminate immediately all agreements that provide for or contemplate the merger of, or a joint venture between, its prerecorded music operations and those of PolyGram in the United States, including but not limited to the Letter of Intent dated July 26, 1983, and Agreement of Merger and Plan of Reorganization dated December 29, 1983; and return or destroy all documents, if any, regarding confidential information provided to Warner by PolyGram in connection with merger or joint venture negotiations or agreements.

II.

It is further ordered, That for a period of five (5) years from the effective date hereof, Warner cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, any interest in, or any stock, share capital or assets of any major record company; *provided, however,* that nothing in this order shall prohibit a director of Warner from acquiring, for investment purposes only, an interest of not more than one (1) percent of the stock, share capital or equity of any such concern.

III.

It is further ordered, That for a period of five (5) years from the effective date hereof, Warner shall not, without providing written advance notification to the Federal Trade Commission, enter into a distribution agreement with a major record company, as defined herein. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"). Warner shall provide the Notification to the Federal Trade Commission at least fifteen (15) days prior to entering into the distribution agreement (hereinafter referred to as the "first waiting period"). The Notification shall be given by Warner and not by any party whose records Warner seeks to distribute. At the time of the filing of the Notification, Warner shall provide to the Commission supplemental information, either in Warner's possession or reasonably available to Warner. Such supplemental information shall include a copy of the proposed agreement; the names of the principal representatives of Warner and the firm whose records are to be distributed who negotiated the proposed distribution agreement; any management or strategic plans discussing the proposed distribution agreement; and documents discussing market shares and competitive conditions in the prerecorded music industry. If within the first waiting period of fifteen (15) days, the Federal Trade Commission makes a written request for additional information, Warner shall comply with said request within an additional period of fifteen (15) days or sooner. Warner shall not enter into the proposed distribution agreement for fifteen (15) days after the submission of the additional information.

IV.

It is further ordered, To the extent that it will affect Warner's compliance obligations arising out of this order, Warner shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or any other changes in the record operations of the corporation.

V.

It is further ordered, That Warner shall, within sixty (60) days after service upon it of this order, and annually thereafter for five years,

file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

Chairman Oliver and Commissioner Strenio did not participate.

IN THE MATTER OF

POLYGRAM RECORDS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON ACTS

Docket 9174. Complaint, March 19, 1984—Decision, Sept. 8, 1986*

This consent order requires, among other things, a New York City record company to obtain prior FTC approval before acquiring any interest in major record companies and to notify the FTC about distribution agreements planned with those companies.

Appearances

For the Commission: *Robert W. Doyle, Jr.* and *Richard Malatt.*

For the respondents: *James E. Akers, Sullivan & Cromwell,* New York City.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents, Chappell & Co. Inc., formerly an affiliated company under common ownership now merged with PolyGram Records, Inc., and PolyGram Records, Inc., with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent, PolyGram Records, Inc., its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in

* Complaint previously published at 108 F.T.C. 105.

further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent, PolyGram Records, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with offices and principal places of business located in the City of New York, State of New York. Respondent Chappell & Co. Inc. was merged with PolyGram Records, Inc. in January of 1984.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions

Warner, as used herein, means Warner Communications Inc., Warner Bros. Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns, and the officers, directors, employees, or agents of their parents, divisions, subsidiaries, successors and assigns.

PolyGram, as used herein, means Chappell & Co., Inc., PolyGram Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns and the officers, directors, employees or agents of their parents, divisions, subsidiaries, successors and assigns.

Major record company, as used herein, means the following record companies that are vertically integrated into the creation and national distribution of prerecorded music: Warner, PolyGram, CBS Inc., and RCA Corporation.

Distribution Agreement, as used herein, means a contractual arrangement whereby one major record company undertakes to distribute nationally prerecorded music for another major record company, as defined herein, to prerecorded music retailers, one-stops, rack jobbers or other subdistributors for resale.

Prerecorded music means recorded audio-only performances sold in the form of records (singles, LPs and compact discs) and tapes (cassettes, 8-track cartridges and reel-to-reel tapes).

Effective date, as used herein, means the date on which the agreement containing consent order between respondent and counsel for the Commission was executed.

I.

It is ordered, That PolyGram terminate immediately all agreements that provide for or contemplate the merger of, or a joint venture between, its prerecorded music operations and those of Warner in the United States, including but not limited to the Letter of Intent dated July 26, 1983, and Agreement of Merger and Plan of Reorganization dated December 29, 1983; and return or destroy all documents, if any, regarding confidential information provided to PolyGram by Warner in connection with merger or joint venture negotiations or agreements.

II.

It is further ordered, That for a period of five (5) years from the effective date hereof, PolyGram cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, any interest in, or any stock, share capital or assets of the United States operations of any other major record company.

III.

It is further ordered, That for a period of five (5) years from the effective date hereof, PolyGram shall not, without providing written advance notification to the Federal Trade Commission, enter into a United States distribution agreement with any other major record company, as defined herein. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"). PolyGram shall provide the Notification to the Federal Trade Commission at least fifteen (15) days prior to entering into the distribution agreement (hereinafter referred to as the "first waiting period"). At the time of the filing of the Notification, PolyGram shall provide to the Commission supplemental information, either in PolyGram's possession or reasonably available to PolyGram. Such supplemental information shall include a copy of the proposed agreement; the names of the principal representatives of PolyGram and the principal representatives of the firm whose records are to be distributed (or that intends to distribute PolyGram's records) who negotiated the proposed distribution agreement; any management or strategic plans discussing the proposed distribution agreement; and documents discussing market shares and competitive conditions in the prerecorded music industry. If within the first waiting period of fifteen (15) days, the Federal Trade Commis-

sion makes a written request for additional information, PolyGram shall comply with said request within an additional period of fifteen (15) days or sooner. PolyGram shall not enter into the proposed distribution agreement for fifteen (15) days after the submission of the additional information.

IV.

It is further ordered, To the extent that it will affect PolyGram's compliance obligations arising out of this order, PolyGram shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or any other changes in the record operations of the corporation.

V.

It is further ordered, That PolyGram shall, within sixty (60) days after service upon it of this order, and annually thereafter for five years, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

Chairman Oliver and Commissioner Strenio did not participate.

IN THE MATTER OF

THE NORTH CAROLINA ORTHOPAEDIC ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3200. Complaint, Sept. 19, 1986—Decision, Sept. 19, 1986

This consent order, among other things, prohibits The North Carolina Orthopaedic Assoc. from placing unreasonable restrictions against podiatrists seeking access to hospital facilities or surgical privileges and inducing hospitals or medical staffs to deny such privileges to qualified podiatrists.

Appearances

For the Commission: *Douglas B. Brown* and *Charles Peterson.*

For the respondent: *George L. Little, Jr.* and *F. Joseph Treacy, Petree, Stockton, Robinson, Vaughn, Glaze & Maready,* Winston-Salem, N.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the North Carolina Orthopaedic Association, a non-profit corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent, the North Carolina Orthopaedic Association, is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina.

PAR. 2. Respondent is a professional association organized in substantial part to represent the interests of orthopedic surgeons who practice in North Carolina and the profession of orthopedics in North Carolina. Respondent has approximately 225 members. Many of respondent's activities are of a scientific and educational nature. A significant portion of respondent's activities furthers its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 3. Most members of the North Carolina Orthopaedic Association provide medical care for a fee. Most, if not all, of respondent's members have been and are now in competition among themselves and with other health care providers in the State of North Carolina.

PAR. 4. In the course of their treatment of patients, North Carolina orthopedic surgeons:

(a) receive and treat patients from other states;

(b) receive substantial sums of money from the federal government and from private insurers for rendering medical services, which money flows across state lines; and

(c) prescribe medicines and medical devices that are shipped in interstate commerce.

PAR. 5. There are approximately 100 podiatrists in North Carolina. Most of them are engaged in the business of providing podiatric services for a fee. Podiatrists in North Carolina are licensed to provide diagnostic, medical and surgical services limited to the foot. Podiatrists compete with orthopedic surgeons in the delivery of some health care services.

PAR. 6. In the course of their treatment of patients, North Carolina podiatrists:

(a) receive and treat patients from other states;

(b) receive substantial sums of money from the federal government and from private insurers for rendering medical services, which money flows across state lines; and

(c) prescribe medicines and medical devices that are shipped in interstate commerce.

PAR. 7. Graduates of podiatry schools and residency programs in podiatry decide where to practice based on a number of factors. One important factor for many podiatrists is their ability to obtain access to hospital facilities that allow them to perform surgery within the scope of their state licenses and in accordance with their training and experience.

PAR. 8. The acts or practices described herein are in interstate commerce or affect the interstate activities of respondent's members, third parties who pay for orthopedic services, hospitals, podiatrists, or others, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 9. Respondent has agreed, combined, or conspired with some of its members and with others to engage in conduct that unreasonably restrains the practice of podiatry. In particular, they have agreed, combined, or conspired to take action to exclude or unreasonably discriminate against podiatrists who seek, within the scope of their professional licenses as described in Paragraph Five, surgical privi-

leges or access to or use of hospital facilities. As part of or in furtherance of the agreement, combination, or conspiracy regarding podiatry, respondent passed two resolutions opposing the hospital practice of podiatry, its members were enjoined to review or change hospital bylaws accordingly, and some of respondent's members have participated in such review or change of hospital bylaws.

PAR. 10. The purposes or effects and the tendency and capacity of the agreement, combination, or conspiracy and the acts and practices described in Paragraph Nine of this complaint are and have been to unreasonably restrain competition and to deny to the public the benefits of competition in the following ways, among others:

(a) Competition based on price, quality and service in the delivery of professional health services has been lessened;

(b) The ability of patients and prospective patients to select a licensed practitioner of their choice has been hindered;

(c) The ability of podiatrists to compete with medical doctors has been restricted; and

(d) Podiatrists have been discouraged from practicing in North Carolina because of the difficulty of obtaining hospital privileges.

PAR. 11. The aforesaid agreement, combination, or conspiracy and the acts and practices of respondent constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such agreement, combination, or conspiracy and the acts and practices of respondent are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent North Carolina Orthopaedic Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That, for the purpose of this order, *respondent* means the North Carolina Orthopaedic Association, a non-profit corporation, its Executive Committee, officers, representatives, agents, employees, successors, and assigns.

II.

It is ordered, That respondent shall cease and desist from, directly or indirectly or through any corporate or other device, in or in connection with respondent's activities as a professional non-profit association in or affecting commerce, the following:

A. Entering into, continuing, maintaining, adhering to, acquiescing in, or aiding and abetting any agreement, combination or conspiracy to unreasonably exclude, unreasonably discriminate against, or place unreasonable restrictions on any podiatrist seeking or having surgical privileges at any hospital or access to or use of any hospital facilities, when such privileges, access or use is permitted under North Carolina law;

B. Inducing or seeking to induce any hospital, hospital medical staff, physician, or other person or entity to obstruct or deny surgical privileges at any hospital or access to or use of any hospital facilities

by the podiatric profession or any licensed podiatrist through any representation that is false or deceptive within the meaning of the Federal Trade Commission Act.

Provided, That nothing in subpart II(B) shall prohibit respondent from making or publishing a representation for which respondent possesses a reasonable basis regarding the training, education, practice, or other qualifications of podiatrists or any individual podiatrist.

Provided further, That nothing in this order shall prohibit respondent from exercising rights guaranteed by the First Amendment to the United States Constitution to petition any federal, state, or local government, executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal, state, or local administrative or judicial proceeding.

III.

It is further ordered, That, within sixty (60) days after the date of service of this order, respondent shall:

A. Mail or otherwise furnish a copy of this order, accompanied by the cover letter attached as Appendix I, to each person who on the date of service of this order is a member of respondent and to each person who on the date of service of this order is an executive employee of respondent;

B. Mail or personally deliver a copy of this order, accompanied by the cover letter attached as Appendix I, to the President of the North Carolina Medical Society;

C. Withdraw any policy, standard, or position regarding podiatry, if any, that is inconsistent with the terms of Part II of this order.

IV.

It is further ordered, That respondent shall:

A. File a written report with the Commission within ninety (90) days following the date of service of this order, and annually on the anniversary of the date of service of this order for a period of five (5) years, and at such other times as the Commission or Commission staff may by written notice to respondent require, setting forth in detail the manner and form in which it has complied with this order;

B. For five (5) years after the date of service of this order, maintain and make available to the Commission staff, for inspection and copying upon reasonable notice, any documents regarding podiatric clini-

cal privileges or access to hospital facilities, podiatric training or education, or the appropriate scope of practice by podiatrists; and

C. For five (5) years after the date of service of this order, provide each new member and each new executive employee of the respondent, or any other employee whose responsibilities include disseminating respondent's views, with a copy of this order at the time he or she is accepted into membership or employment.

V.

It is further ordered, That respondent shall notify the Commission of any proposed change in its organization at least thirty (30) days prior to the proposed change in respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change that may affect compliance with this order.

APPENDIX I

Dear [Sir or Madam]:

As you may know, on _____ the Federal Trade Commission issued a Consent Order settling charges that the North Carolina Orthopaedic Association (NCOA) has been involved in activities that restricted the lawful practice of podiatry and restrained competition between medical doctors and podiatrists. This order was entered as part of a compromise settlement in order to save NCOA the expense of defending a costly litigation and without any admission whatsoever of any wrongdoing on the part of NCOA. NCOA has not admitted that it has violated the law, nor admitted that it has done the acts alleged in the Complaint except those relating solely to jurisdiction.

Under the terms of the Order issued by the Commission, among other things, NCOA is prohibited from entering into or maintaining any agreement or conspiracy to unreasonably exclude or discriminate against any podiatrist seeking or having surgical privileges at any hospital or access to or use of any hospital facilities, when such privileges, access or use is permitted under North Carolina law.

The Order also prohibits NCOA from inducing any hospital, hospital medical staff, physician, or other person or entity to obstruct or deny surgical privileges at any hospital or access to or use of any hospital facilities by the podiatric profession or any licensed podiatrist through any representation for which NCOA does not have a reasonable basis.

The Order, however, does not prohibit NCOA or its members from exercising their First Amendment rights to petition any legislative or executive body concerning any rules, legislation, or procedures, or participating in any administrative or judicial proceeding. The Order does not prevent any individual from engaging in unilateral conduct, in an individual capacity and not as an officer, agent or representative of NCOA.

Pursuant to the Order issued by the Federal Trade Commission, we are withdrawing all of our policies and statements relating to podiatry, if any, that are not consistent with the Order.

Your attention to these matters will be appreciated. Thank you for your cooperation.

Sincerely,

President
The North Carolina Orthopaedic Association

IN THE MATTER OF

PITTSBURGH PENN OIL COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9203. Complaint, Jan. 16, 1986—Decision, Sept. 29, 1986

This consent order requires, among other things, a Creighton, Pa. automotive fluids company to cease falsely representing that its automotive oils, transmission fluids and antifreeze meet standardized industry ratings and standards established by Ford and General Motors.

Appearances

For the Commission: *James K. Leonard, Nathan P. Owen* and *Tamra S. Kempf.*

For the respondents: *Stephen J. Laidhold, Lampl, Sable, Makoroff & Libenson,* Pittsburgh, Pa.

COMPLAINT

The Federal Trade Commission, having reason to believe that Pittsburgh Penn Oil Company, a corporation, and Fred Danovitz, individually and as an officer of said corporation ("respondents"), have violated Section 5 of the Federal Trade Commission Act and, it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent Pittsburgh Penn Oil Company is a Pennsylvania corporation with its principal office and place of business located at Box 296, Route 28, Freeport Road, Creighton, PA.

(b) Respondent Fred Danovitz is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporate respondent.

(c) Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents are, and have been, engaged in the production and sale of substantial quantities of engine oil, automatic transmission fluid, antifreeze-coolant and other automotive and petroleum products. Respondents package their products under the brand names of the corporate respondent, including Prize Penn, Sure-Matic and

Sure Permanent, and under the brand names of independent merchandisers.

PAR. 3. In the course and conduct of their business, respondents cause their products to be sent to purchasers in various States of the United States. Respondents prepare promotional and labeling materials for their products and disseminate these materials in various States of the United States. Respondents maintain, and at all times relevant herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and in order to induce the sale of their engine oils, respondents have made statements in their promotional literature and on their containers of engine oil. Typical of these statements are the following:

1. SAE 10W–40
2. Exceeds requirements for A.P.I. service classifications—SC, SD, SF

PAR. 5. Through the use of these and other similar statements, respondents have represented, directly or by implication, that respondents' engine oils have met the standards established by the Society of Automotive Engineers ("SAE") and the American Petroleum Institute ("API") for the stated SAE viscosity and API service classification, respectively.

PAR. 6. In truth and in fact, in numerous instances, respondents' engine oils have not met the standards established by the SAE and the API for the stated SAE viscosity and API service classification, respectively. Therefore, the representation set forth in Paragraph Five has been, and is, false and misleading.

PAR. 7. In the course and conduct of their business, and in order to induce the sale of their engine oils, respondents have made statements on their containers of engine oil not labeled with any API service classification. Typical of these statements are the following:

1. High grade lubricant for modern high-speed motors
2. Longer engine life for the new long-life engines

PAR. 8. Through the use of these and other similar statements, respondents have represented, directly or by implication, that respondents' engine oils were suitable for use in engines manufactured in model years 1980 to the present.

PAR. 9. In truth and in fact, in numerous instances, respondents' engine oils have not been suitable for use in engines manufactured in model years 1980 to the present. Therefore, the representation set forth in Paragraph Eight has been, and is, false and misleading.

PAR. 10. In the course and conduct of their business, and in order to induce the sale of their automatic transmission fluids, respondents have made statements on their containers of automatic transmission fluid. Typical of these statements are the following:

1. "DEXRON® II" or "a substitute for DEXRON® II"
2. "Type F"
3. "Ford Approved"

PAR. 11. Through the use of these and other similar statements, respondents have respectively represented, directly or by implication, that respondents' automatic transmission fluids have met the standards established by General Motors Corporation for DEXRON® II transmission fluids, have met the standards established by Ford Motor Company for Type F automatic transmission fluids, and have been approved by Ford Motor Company.

PAR. 12. In truth and in fact, in numerous instances, respondents' automatic transmission fluids have not met the standards established by General Motors Corporation for DEXRON® II automatic transmission fluids, have not met the standards established by Ford Motor Company for Type F automatic transmission fluids, and have not been approved by Ford Motor Company. Therefore, the representations set forth in Paragraph Eleven have been, and are, false and misleading.

PAR. 13. In the course and conduct of their business, and in order to induce the sale of their antifreeze-coolants, respondents have made statements on their containers of antifreeze-coolant. Typical of these statements is a "protection chart" stating that respondents' antifreeze-coolant has afforded given levels of protection against freezing in engine cooling systems, including protection against freezing down to -34 degrees F. when respondents' antifreeze-coolant has been mixed with an equal amount of water.

PAR. 14. Through the use of this chart and other similar statements, respondents have represented, directly or by implication, that respondents' antifreeze-coolant has afforded the stated levels of protection against freezing in engine cooling systems, including protection down to -34 degrees F. when mixed with an equal amount of water.

PAR. 15. In truth and in fact, in numerous instances, respondents' antifreeze-coolant has not afforded the stated levels of protection against freezing in engine cooling systems, including protection down to -34 degrees F. when mixed with an equal amount of water. Therefore, the representation set forth in Paragraph Fourteen has been, and is, false and misleading.

PAR. 16. Through the use of the statements described in Paragraphs Four, Seven, Ten and Thirteen and the use of other similar statements, respondents have represented, directly or by implication, that

at the times of making the representations set forth in Paragraphs Five, Eight, Eleven and Fourteen, respectively, respondents possessed and relied upon a reasonable basis for making those representations.

PAR. 17. In truth and in fact, at such times respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, the representation set forth in Paragraph Sixteen was, and is, false and misleading.

PAR. 18. Respondents' dissemination of the aforesaid material representations and the placement in the hands of others of means and instrumentalities by and through which others may have used the aforesaid representations have had, and now have, the likelihood to mislead consumers and to induce such consumers to purchase and use respondents' engine oils, automatic transmission fluids and anti-freeze-coolants.

PAR. 19. The acts or practices of respondents as alleged in this complaint constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Pittsburgh Penn Oil Company is a Pennsylvania

corporation with its principal office and place of business located at Box 296, Route 28, Freeport Road, Creighton, PA.

Respondent Fred Danovitz is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondents Pittsburgh Penn Oil Company, a corporation, its successors and assigns, and its officers, and Fred Danovitz, individually and as an officer of the corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the production, labeling, advertising, offering for sale, sale or distribution of any engine oil, automatic transmission fluid or antifreeze-coolant in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication (*e.g.*, by making a product claim such as "high grade lubricant for modern high-speed motors" or "longer engine life for the new long-life engines"), that any engine oil has any American Petroleum Institute (API) service classification;

B. Representing, directly or by implication, that any engine oil has any Society of Automotive Engineers (SAE) viscosity;

C. Representing, directly or by implication, that any automatic transmission fluid has been approved by or meets any specification set by General Motors Corporation, Ford Motor Company or any other company;

D. Representing, directly or by implication, that any antifreeze-coolant affords a stated level of protection against freezing in engine cooling systems; or

E. Representing, directly or by implication, that any engine oil, automatic transmission fluid or antifreeze-coolant possesses any other performance or quality characteristic or has been tested or approved;

unless such representation is true and unless, at the time of making such representation, respondents, their successors or assigns possess and rely upon competent and reliable evidence which substantiates the representation.

II.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the production, labeling, advertising, offering for sale, sale or distribution of any automotive or petroleum product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, that any such product possesses any performance or quality characteristic or has been tested or approved.

III.

It is further ordered, That respondents, their successors and assigns shall draw a representative sample from each production batch or run, and from each filling run, of engine oil, automatic transmission fluid and antifreeze-coolant, shall document the method or methods used to draw such samples, and shall for at least one year retain and upon reasonable notice make available to the Commission for inspection and testing a properly marked portion of each such sample and that for a period of three (3) years after the date of service of this order respondents, their successors and assigns shall, at the option of the Commission, cause to be tested (as described below) by a competent and independent laboratory approved by the Commission, at the expense of respondents, their successors or assigns, up to seventy-five (75) samples of engine oil, automatic transmission fluid and/or antifreeze-coolant, the samples being either such retained samples or samples sold by respondents, their successors or assigns, and shall submit to the Commission copies of the results of such tests within twenty (20) days after the Commission has identified the retained sample(s) to be tested or has tendered the sold sample(s) to be tested, as the case may be; *provided, however,* that the twenty (20)-day period shall be extended by the length of any delay during the period beyond the control of respondents, their successors or assigns:

A. Engine oil samples tested pursuant to this Part shall be subjected to the then current version of the following American Society for

Testing and Materials (ASTM) tests and other tests or any succeeding tests that have the same force and effect:

1. Kinematic viscosity at 100 degrees C. (ASTM D445);
2. Low-temperature viscosity (multi-temperature version of ASTM D2602, described in Appendix A of SAE J300 APR 84) (test required only for multigrade oils);
3. Borderline pumping temperature (ASTM D3829) (test required only for multigrade oils);
4. Nitrogen (ASTM D3228 or chemiluminescence);
5. Sulfated ash (ASTM D874);
6. Total Base Number (ASTM D2896); and
7. Elemental analysis showing parts per million of barium, calcium, magnesium, phosphorus, sodium, and zinc (emission spectrometry or other generally accepted method).

B. Automatic transmission fluid samples tested pursuant to this Part shall be subjected to the then current version of the following tests or any succeeding tests that have the same force and effect:

1. Kinematic viscosity at 100 degrees C. (ASTM D445);
2. Flash point (ASTM D92);
3. Brookfield viscosity at -40 degrees C. (ASTM D2983);
4. Nitrogen (ASTM D3228 or chemiluminescence); and
5. Elemental analysis showing parts per million of boron, calcium, phosphorus, sulfur, and zinc (emission spectrometry or other generally accepted method.

C. Antifreeze-coolant samples tested pursuant to this Part shall be subjected to the then current version of the following tests or any succeeding tests that have the same force and effect:

1. Specific gravity (ASTM D1122);
2. Freezing point, 50% by volume in distilled water (ASTM D1177);
3. Boiling point, 50% by volume in distilled water (ASTM D1120);
4. pH, 50% by volume in distilled water (ASTM D1287);
5. Reserve alkalinity (ASTM D1121);
6. Water, % by weight (ASTM D1123); and
7. Elemental analysis showing parts per million of boron, phosphorus, silicon, and sodium (emission spectrometry or other generally accepted method).

IV.

It is further ordered, That respondents, their successors and assigns shall clearly and indelibly mark each container or the outside of each case of engine oil, automatic transmission fluid and antifreeze-coolant

with information identifying the relevant production batch(es) or run(s), production date(s) and filling date(s); *provided,* that containers so marked shall be marked on the day of filling, and cases so marked shall be marked on the day of packing.

V.

It is further ordered, That respondents, their successors and assigns shall retain records which substantiate any representation covered by this order for three (3) years after the last date on which the representation was made and upon reasonable notice shall make such records available to the Commission for inspection and copying; *provided,* that for engine oils, automatic transmission fluids and antifreeze-coolants produced or packaged by respondents, their successors or assigns, such records shall include blend formulas and specifications; formulas and specifications supplied to respondents, their successors or assigns by additive companies; documents describing the physical and chemical characteristics of additives purchased by respondents, their successors or assigns; pertinent licensing agreements; records describing purchases and inventories of base stocks and additives of respondents, their successors or assigns; records showing for each production batch or run the production date, the tank(s) used, the quantity of each ingredient used, the date of transfer to another tank(s), the tank(s) so used, the quantity transferred to each tank, and the results of quality control tests run; records showing for each filling run the filling date, the tank(s) used, the quantity drawn from each tank, the size and number of containers filled, the results of quality control tests run, and, if known at the time of the filling run, the shipping destination and intended customer; and records indicating the dates on which each tank used in production or filling is emptied.

VI.

It is further ordered, That respondents, their successors and assigns shall retain records of their sales of engine oil, automatic transmission fluid and antifreeze-coolant for three (3) years after each such sale which identify the name and address of each purchaser and the quantity of each of these products sold to each purchaser, shall retain for three (3) years from the date of their first possession all documents, including letters from consumers, customers and industry members and responses thereto, which constitute or relate to a complaint about or an unfavorable assessment of any engine oil, automatic transmission fluid or antifreeze-coolant sold by respondents, their

successors or assigns and upon reasonable notice shall make such records and documents available to the Commission for inspection and copying; *provided*, that, this Part VI shall apply only to such sales and first possessions occurring within five (5) years of the date of service of this order.

VII.

It is further ordered, That respondent Pittsburgh Penn Oil Company, its successors and assigns shall forthwith distribute a copy of this order to each of its subsidiaries and divisions and to all present and future agents, representatives and employees having responsibilities for advertising, production, packaging, quality control or corporate policy with respect to the subject matter of this order, shall secure from each such person a signed and dated statement acknowledging receipt of the order and shall maintain such statement for three (3) years after the end of such person's employment by respondent, its successors or assigns.

VIII.

It is further ordered, That respondent Fred Danovitz shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment and that, for a period of ten (10) years from the date of service of this order, respondent Fred Danovitz shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the production, labeling, advertising, offering for sale, sale or distribution of any automotive, petroleum or chemical product and of his affiliation with any new business or employment in which his own duties or responsibilities involve the production, labeling, advertising, offering for sale, sale or distribution of any automotive, petroleum or chemical product, with each such notice to include his new business address and a statement of the nature of the business or employment in which he is newly engaged, as well as a description of his duties and responsibilities in connection with the business or employment.

IX.

It is further ordered, That respondent Pittsburgh Penn Oil Company, its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change to itself, such as dissolution, assignment or sale resulting in the emergence of a successor

corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of this order.

X.

It is further ordered, That respondents, their successors and assigns shall, within sixty (60) days after the date of service of this order, file a written report with the Commission setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2929. Consent Order, Sept. 26, 1978—Modifying Order, Oct. 3, 1986

The Federal Trade Commission has modified a 1978 consent order with respondents by setting aside the portions of the order pertaining to the exclusive dealing prohibitions. The Commission concluded that respondents do not have the market power to exclude competitors.

ORDER REOPENING AND SETTING ASIDE PORTIONS OF ORDER ISSUED SEPTEMBER 26, 1978

On May 6, 1986, respondents Interco Incorporated ("Interco"), Londontown Corporation ("Londontown") and Queen Casuals, Inc. ("Queen Casuals") filed a "Request As Supplemented To Reopen And Set Aside Part Of Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. Londontown and Queen Casuals are wholly owned subsidiaries of Interco. The Request asked the Commission to reopen the consent order issued on September 26, 1978, ("the order") and set aside paragraphs (1) and (2) of Part II of the order. [92 F.T.C. 404]

Paragraphs (1) and (2) of Part II of the order are applicable only to respondents' footwear products. Paragraph (1) of Part II forbids respondents from enforcing any agreement, understanding or arrangement which prevents resellers or prospective resellers from selling the footwear products of competitors or from independently determining the volume of footwear to be purchased from competitors. Paragraph (2) of Part II prohibits respondents from requiring or inducing resellers to cancel orders for or not purchase footwear products supplied by competitors.

After reviewing respondents' Request, the Commission has concluded that the public interest warrants reopening and setting aside the mentioned paragraphs of the order as requested by respondents. The action we take today is consistent with our previous determinations in *Brown Shoe Company, Inc.,* Docket No. 7606, July 16, 1984 [104 F.T.C. 266], and in *International Shoe Company,* Docket No. 6835, January 30, 1985 [105 F.T.C. 191]. In both of those matters the Commission set aside perpetual exclusive dealing orders in the footwear industry. The same considerations which prompted our actions in

these earlier matters are applicable to the present request. Respondents have demonstrated that they do not have market power in the domestic footwear industry either at the manufacturing or retailing levels. Given the present characteristics of the shoe industry and that respondents do not have market power by which they may exclude competitors, paragraphs (1) and (2) of Part II of the order now serve no procompetitive purpose and may impede respondents' efforts to achieve efficient distribution of their footwear products through lawful practices available to their competitors.

Accordingly, *it is ordered* that this matter be and it hereby is reopened and that paragraphs (1) and (2) of Part II of the Commission's Decision and Order issued on September 26, 1978, shall be of no further force and effect.

IN THE MATTER OF

MAX FACTOR & CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC 2(d) OF THE CLAYTON ACT

Docket C-3201. Complaint, Oct. 15, 1986—Decision, Oct. 15, 1986

This consent order requires, among other things, a Stamford, Conn. cosmetics company to make promotional allowances available on proportionally equal terms to all of its customers, and in particular, to make alternatives, such as handbills or other in-store promotional activities, available to customers for whom its basic promotional plans are not usable or economically feasible. Respondent is required to notify all its customers that the promotional payments and alternatives are available.

Appearances

For the Commission: *Paul R. Roark.*

For the respondents: *Steven C. McCracken, Gibson, Dunn & Crutcher,* Newport Beach, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Max Factor & Co. has violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13(d)), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Max Factor & Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 Gatehouse Road, Stamford, Connecticut.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, sale, and distribution of cosmetic products.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, having

sold and shipped its cosmetic products or caused them to be transported from its previous principal place of business in California and its current principal place of business in Connecticut to customers located in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of credits or sums of money, hereinafter referred to as "promotional allowances," either directly or indirectly by way of discounts, allowances, rebates, or deductions, as compensation or in consideration for promotional services or facilities, including advertising in various media such as newspapers, furnished by customers in connection with the sale or offering for sale of respondent's cosmetic products.

PAR. 5. In granting promotional allowances, respondent discriminated against particular customers in that respondent did not make such promotional allowances functionally available, on proportionally equal terms, to all customers competing in the sale and distribution of respondent's cosmetic products. Respondent failed to offer alternative terms and conditions to customers for whom respondent's basic promotional allowances were not usable and suitable.

PAR. 6. The acts and practices of respondent set forth in Paragraphs 4 and 5 above violate Section 5 of the Federal Trade Commission Act, as amended, and Section 2(d) of the Clayton Act, as amended. The acts and practices of respondent, as herein alleged, may recur in the absence of the relief herein contemplated.

Chairman Oliver and Commissioner Strenio dissented.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Max Factor & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 Gatehouse Road, Stamford, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for the purposes of this order, the following definitions shall apply:

A. The term *cosmetic products* shall mean cosmetics, fragrances, toiletries, and beauty aids.

B. The term *respondent's cosmetic products* shall include: (a) all cosmetic products advertised, offered for sale, sold, or distributed by respondent; (b) all cosmetic products bearing any of respondent's trademarks that are advertised, offered for sale, sold, or distributed by respondent's corporate parent or a division or subsidiary of such parent; and (c) all cosmetic products advertised, offered for sale, sold, or distributed by respondent's corporate parent or a division or subsidiary of such parent as part of a program in which cosmetic products bearing any of respondent's trademarks are also advertised, offered for sale, sold, or distributed.

II.

A. *It is further ordered,* That respondent Max Factor & Co., a corporation, and its officers, directors, agents, representatives, and employees, and its successors and assigns, directly or indirectly or

through any corporation, subsidiary, division or other device, shall cease and desist from paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for advertising or promotional services or facilities furnished by or through such customer in connection with the advertising, offering for sale, sale, or distribution of respondent's cosmetic products in or affecting commerce, as "commerce" is defined in the Clayton Act, as amended, or the Federal Trade Commission Act, as amended, unless:

1. Respondent makes such compensation or consideration available on proportionally equal terms for alternative services or facilities that are usable and economically feasible for all customers who compete in the distribution or resale of respondent's cosmetic products and for whom respondent's basic promotional plans are not usable or economically feasible; *provided,* that with respect to respondent's cooperative advertising and drive plans, such alternative services or facilities may include handbills and circulars in amounts not less than 1,000, or other in-store promotional activities acceptable to respondent; and

2. All customers who compete in the distribution or resale of respondent's cosmetic products are informed in the manner provided in Paragraph II.B. of this order of the availability of such compensation or consideration.

B. *It is further ordered,* That respondent shall inform those retailers who purchase respondent's cosmetic products, including retailers who do not purchase directly from respondent, of the availability of its promotional plans, as required by Paragraph II.A. of this order, as follows:

1. Respondent shall imprint on the smallest shipping container used for respondent's cosmetic products the legend, "Promotional allowances are periodically made available by Max Factor & Co. to all retailers. To obtain information about these promotional opportunities contact your Sales Representative or call [Mary O'Brian at our Headquarters office (212) 856–6664]"; and

2. For each promotion respondent shall cause copies of "offer letters" or similar materials explaining the availability of alternative methods of participation in respondent's advertising or promotional program or plan to be supplied to all direct purchasing retailers, and to its wholesalers or distributors in sufficient quantity for presentation or delivery by such wholesalers or distributors to each customer of such wholesaler or distributor, and shall request such wholesalers and distributors to present or deliver such materials to such customers.

C. *Provided, however,* That nothing herein contained shall be con-

strued or interpreted to abridge or otherwise restrict respondent's entitlement to avail itself of the "Meeting Competition Defense," the provisions of which are contained in Section 2(b) of the Clayton Act, 15 U.S.C. 13(b), as amended.

III.

It is further ordered, That respondent shall deliver, within thirty (30) days of the date of service upon it of this order, a copy of this order to all current sales management and sales personnel who are engaged in the sale of any of respondent's cosmetic products within the United States, and shall for a period of five (5) years thereafter deliver a copy of this order to all such future sales management and sales personnel within thirty (30) days of their employment in such positions.

IV.

It is further ordered, That respondent shall, within sixty (60) days after the date of service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries doing business in the United States, or any other change in respondent that may affect compliance obligations arising out of the order.

Chairman Oliver and Commissioner Strenio dissented.

DISSENTING STATEMENT OF CHAIRMAN DANIEL OLIVER

In a decision that ignores the interests of American consumers, a majority of the Commission has determined to accept a consent order in this matter arising out of charges that respondent Max Factor violated Section 5 of the Federal Trade Commission Act, and Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. Specifically, the Commission's complaint issued with this consent alleges that Max Factor engaged in unlawful discriminatory promotional allowances. For the reasons stated below, I dissent from the issuance of an order in this matter.

As a matter of both statutory law and decisional precedent, the

Commission has a responsibility to justify—on public interest grounds—any action it takes. Section 5(b) of the FTC Act provides that the Commission shall issue a complaint only when it appears that a proceeding "would be to the interest of the public. . . ." As long ago as 1929, the Supreme Court held that "to justify the Commission in filing a complaint under §5, the purpose must be protection of the public," and concluded that "[i]n determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion."[1]

The Robinson-Patman Act, violations of which are also alleged here, does not require a specific finding that enforcement action will serve the public interest.[2] The case law interpreting that section, however, makes clear that the Commission has the same broad discretion as with Section 5 of the FTC Act in choosing how it will deploy its resources.[3]

Within the past year, this principle respecting agency discretion has been reaffirmed by the Supreme Court:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.[4]

Ignoring its obligation to act in the public interest, the majority has opted instead to impose an anticompetitive order on a notion that there has been a technical violation of the law.[5] Such a course of

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[1] *FTC v. Klesner*, 280 U.S. 19, 27, 28 (1929). *See also FTC v. Royal Milling Co.*, 288 U.S. 212 (1933); *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962).

[2] Indeed, a literal reading of the statute might suggest the contrary. Clayton Act Section 11(b) provides that "[w]henever the Commission or Board vested with jurisdiction . . . shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of [the] Act, it shall issue . . . a complaint. . . ." Section 2 of the Clayton Act is, of course, the Robinson-Patman Act.

[3] In *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958), for example, the Court held in a Robinson-Patman case that "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."

[4] *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 1656, 84 L.Ed. 2d 714 (1985). Although the argument can be made that entry of this order consumes few additional resources, the great bulk of the expenditures necessary to prosecute this action already having been spent, I find such reasoning to be unpersuasive. The fact that many resources may have been misallocated in the past does not justify waste of some future resources. Moreover, entry of this order will necessitate future expenditures in the form of compliance costs. Any enforcement proceedings similarly would entail further resources.

[5] The majority apparently infers that Max Factor committed a technical violation, based in part, it seems, on its willingness to sign a consent decree. Yet it is unclear to me that any violation was committed. Our past precedents indicate that proportionality can be based on value to the seller, *Lever Bros. Co.*, 50 F.T.C. 494 (1953), an approach that has been approved by the Supreme Court. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 61 n.4 (1959). The record does not indicate whether or not Max Factor's payments were proportional to value. In addition, promotional allowances do not violate the Robinson-Patman Act if they are made to meet competition, *Exquisite*

(footnote cont'd)

action is, in my view, regrettable and inconsistent with established precedent.

I can find no basis, and none has been suggested to me by staff or the Commission majority, for concluding that any public interest is served by entry of this consent order.[6] To the contrary, the far more likely result of today's action will be decreased consumer welfare by forcing Max Factor to operate at less than maximum efficiency and at a competitive disadvantage relative to other firms in the industry.

I reach this conclusion on the basis of certain critical facts that are not in dispute. First, the cosmetics industry is intensely competitive. Although there may be disagreement regarding precise market shares, all agree that there are numerous competitors in each segment of the overall cosmetics market.

Second, there has never been the hint of a suggestion from any quarter that any of Max Factor's practices had an adverse impact on competition.[7] Max Factor is but one of a large number of cosmetic suppliers, none of which appears at any point to have possessed the power to raise prices or dictate the terms of purchase.

Third, Max Factor is clearly a declining firm in a competitive industry. The record suggests that in terms of market share and sales, Max Factor has suffered severe declines both recently and during the period that it allegedly engaged in discriminatory promotional activities (the late 1970's).

Fourth, it has now been nearly seven years since the occurrence of the practices that gave rise to this action. In the interim, Max Factor has undergone four changes in ownership and management. Moreover, its corporate headquarters has moved from Los Angeles to Stamford, Connecticut, resulting in a wholesale change in management.

From these undisputed facts, certain conclusions are inescapable. First, even the limited record before us demonstrates that because the cosmetics industry is intensely competitive, the market will not allow

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Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962). In light of Max Factor's market share, it appears probable that its allowances were driven by competitive necessity rather than an exercise of economic price discrimination.

[6] It has been suggested that the public interest in Robinson-Patman cases is not with advancing consumer welfare but with protecting the vitality of small businesses. Even assuming, for the sake of argument, the validity of such a theory, this order does not serve even that interest. In the first place, Max Factor *is* a minor and struggling player in the intensely competitive cosmetics industry. The purported beneficiary has become instead the prey. Moreover, to the extent the public interest is defined as encouraging protection of small buyers, there is no basis for entering this order. This proceeding was not initiated as the result of buyer complaints, and no buyer—small or large—was shown by the staff's evidence to have been placed at a competitive disadvantage as a result of any alleged conduct.

[7] I am aware that the weight of authority currently accords virtual per se status to Sections 2(d) and 2(e) of the Robinson-Patman Act, and that a showing of competitive injury is not required to prove a violation. Although there is authority to the contrary (*e.g., Allen Pen Co. v. Springfield Photo Mount Co*, 653 F.2d 17, 24–25 (1st Cir. 1981)), that issue need not be reached in the setting of the present case. Regardless of what the result would be if the issue arose in the context of a full scale trial on the merits, we are presented with a very different situation: the issues here are (a) whether in the proper exercise of prosecutorial discretion the Commission should devote scarce enforcement and compliance resources every time a technical violation of the statute is alleged, even though there is absolutely no proof of injury to competition or consumers, and (b) whether the Commission is compelled to issue an order it can predict will be anticompetitive.

price or service discrimination of any systematic or persistent sort. Prices among buyers will tend to reflect cost differences, and promotional expenditures among buyers will in any meaningful sense tend to be proportionally equal. As noted above, the staff has uncovered no evidence that any allegedly disfavored buyer lost sales or was placed at a competitive disadvantage as a result of any conduct engaged in by Max Factor.

Second, the existence of a competitive market suggests that Max Factor, already a declining firm, will be disadvantaged by the order, relative to its competitors. When competition prevails, promotions or discounts are offered only if the supplier perceives that it is efficient to do so; *i.e.*, the supplier receives equivalent value in exchange for the promotion or discount. Thus, to the extent the order requires payments to those not previously offered such, it forces discrimination in their favor. Such a result is inefficient, decreases consumer welfare, and is not in the public interest. Moreover, entry of the majority's order will subject Max Factor to higher penalties and significantly more stringent record-keeping compliance obligations than its competitors. This undoubtedly will have a chilling effect on Max Factor's marketing, including its competitive pricing decisions. It can also be expected to result in a sales decline and a decrease in consumer satisfaction. Can this result be in the public interest?

Third, the several changes in ownership and the complete overhaul in management, coupled with evidence that Max Factor has implemented an extensive Robinson-Patman Act compliance program, suggest that there is little cognizable danger of any recurring law violation. In these circumstances, it is incumbent on the Commission, in the exercise of its discretion, to close the investigation.[8] The unlikelihood of recurrence is further suggested by the extended length of time since the period of the alleged violations.[9]

In addition, the unusually broad scope of the order raises very real concerns. The majority order applies to cosmetic products not only of Max Factor or bearing Max Factor trademarks, but also those of its "corporate parent or a division or subsidiary of such a parent," if the products of both Max Factor and its parental affiliate are sold "as part of a program."

Although the meaning of that somewhat vague quoted term is not further defined by the order, one need not possess extraordinary power to understand the attendant problems that may arise. Owner-

[8] *Borg-Warner Corp. v. FTC*, 746 F.2d 108 (2d Cir. 1984); *International Harvester Co.*, 104 F.T.C. 949, 1069–70 (1984) (no order warranted because, *inter alia*, "Harvester's voluntary notification program has already provided all the relief that could be expected from a Commission order" and Harvester was unlikely to "return to its earlier violation"); *Chesebrough-Pond's Inc.*, 66 F.T.C. 252 (1964); *Paxton & Gallagher Co.*, 59 F.T.C. 1089 (1961) (changes in respondent's ownership and management vitiated Commission concern with resumption of unlawful conduct).

[9] *Great Southwestern Land Co.*, 73 F.T.C. 440 (1968); *Simon & Schuster, Inc.*, 71 F.T.C. 1490 (1968).

ship of Max Factor has turned over several times in the recent past. There is no evidence to suggest that this trend has run its course. Entry of this order, however, could impose tremendous costs in the form of inefficiencies on a subsequent purchaser—in particular one already part of the cosmetics industry.

Specifically, to avoid falling within the burdensome umbrella of the order, an acquiring company might have to structure the transaction in a manner that is less than efficient. Moreover, the post-acquisition entity would be inclined to shy away from such potentially efficient practices as common sales forces or collective advertising.

An equally unfortunate result will be the inevitable chilling effect felt by new owners discouraged from engaging in aggressive or innovative marketing schemes that are potentially pro-competitive. Less vigorous and more expensive marketing admits of only one consequence—higher costs passed through in the form of higher prices to consumers. It is difficult, to say the least, to divine the public interest served.

As Commissioner Strenio notes in his dissenting statement (p. 2), the majority has determined to issue a perpetual order against Max Factor. The majority's mistake, enshrined for the ages, serves as a compelling reminder why orders should be limited to finite terms.

This Commission's record in enforcing the Robinson-Patman Act does not commend the Commission to the American consumer. Its prior interpretations and enforcement actions have worked staggering injury on consumers, to say nothing of small businesses such as Max Factor. The Commission majority today has let slip an opportunity to undo some of that harm. By insisting on an order that is certain to have anticompetitive consequences—with no conceivable offsetting benefits to competition and consumers—the Commission majority turns and retreats away from rational antitrust enforcement. The American consumer deserves better. I had understood this Commission's mandate to be the promotion of consumer welfare through the fostering of competition. I dissent from the majority's refusal to carry out that charge in this case.

SEPARATE STATEMENT BY COMMISSIONER ANDREW J. STRENIO, JR.

I regret that I cannot join in the majority decision. Weighing all the factors in this case, I have concluded that the issuance of this particular consent order is not in the public interest. Instead, I would have directed staff to renegotiate the consent to more carefully tailor it to fit the circumstances revealed on the record.

In order to place this case in context, it is worth noting several factors. To begin with, the violations alleged occurred over six years

ago and the management of Max Factor has changed hands several times in the interim. More importantly, we have no evidence that Max Factor's conduct over six years ago harmed competitors, retailers or consumers.

For example, based on the dated record before us, we have no reason to conclude that Max Factor—a relatively small competitor in an intensely competitive industry—possessed the market power necessary to engage in economic price discrimination or the offering of discriminatory allowances. We have no reason to conclude that smaller retailers received less than a competitive level of promotional allowances. Indeed, we have no reason to conclude that Max Factor had any incentive to harm efficient smaller accounts or to "overpay" larger accounts, since either action would have been directly contrary to Max Factor's interests.

We do, however, have reason to fear that this consent order could harm smaller retailers and consumers. For instance, Max Factor has argued that its promotional efforts to ensure the association of its products with the most upscale stores had a "spillover benefit" of enhanced sales at smaller stores as well. If, because of the order, Max Factor now cuts back its promotional allowances to the most upscale stores, then smaller stores may be hurt by a corresponding reduction in any such spillover benefits. Moreover, if Max Factor is unable to compete [2] vigorously as a consequence of the order, then consumers will ultimately lose as well.[1]

Despite all the above, the Commission's unquestionable duty to enforce the Robinson-Patman Act and the strong evidence of at least a technical violation those six years ago may, nonetheless, provide a basis for securing an appropriate consent order from Max Factor. But this consent order is seriously deficient in two regards.

First, the terms of the order are overly broad. For example, Paragraph II(B)(2) of the order requires Max Factor to provide direct notice of all promotional plans to specified retailers in perpetuity through an expensive and cumbersome process. But effective notice could be provided through a number of alternative mechanisms, such as by adequately advertising in trade publications and the like. Specifying forever a single, costly process for notifying retailers seems unneces-

[1] I have considered the proposition that neither the Robinson-Patman Act nor the Supreme Court's decision in *Simplicity Pattern Co. v. F.T.C.*, 360 U.S. 55 (1959) preclude some examination of efficiency justifications or overall competitive effects of questioned conduct. A number of Supreme Court cases that postdate *Simplicity* state that rigid application of a *per se* rule in Sherman Act cases is not appropriate in every circumstance. For example, to avoid condemning potentially pro-competitive conduct, the Supreme Court in *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 433 U.S. 36 (1977), characterized the *per se* rule as a "demanding standard", *id.* at 50, and stated that "any departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing." *Id.* at 58–59. While I have not reached a firm conclusion on the issue, it may be appropriate for the Commission to consider whether and how modern Supreme Court decisions on *per se* analysis under the Sherman Act should affect our analysis in cases under Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

sarily harsh without a showing that either the law or enforcement considerations mandate such a result.[2]

Second, the order is disturbingly vague because it requires Max Factor to make promotional compensation or consideration available on "proportionally equal terms" without defining what [3] that means. This is important because of Max Factor's claim of spillover benefits from its promotional activities. Again, the claim is that although certain upscale stores may have received higher direct promotional allowances, the assertedly less-favored accounts benefitted indirectly by a resulting general increase in demand for Max Factor products. In turn, Max Factor may have received greater value in increased sales per promotional dollar spent at certain stores.

If this case had been litigated, a major question would have been whether proportionality must be measured solely by the direct cost to Max Factor or whether the value received by Max Factor could be an allowable standard. The answer is not entirely clear. In 1972, the Commission, with no in-depth explanation, appeared to reverse considerable precedent that sustained a value-based approach to proportionality.[3] In effect, the Commission modified its Fred Meyer Guides to require apparently that sellers must provide equal allowances to all buyers based upon cost alone, regardless of the value received by the seller from those expenditures.[4] The law is not completely clear because the Fred Meyer Guides are "guides," not exact prescriptions. On the one hand, the "guides" state that allowances that have little or no relationship to cost or approximate cost of the service provided by the retailer "*may* be considered to be in violation" of the law[5] while, on the other, "[n]o single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used."[6] One commentator generally sympathetic to the Robinson-Patman Act has noted that there has been no judicial explication of the Commission's 1972 modification, either [4] accepting it or attempting to interpret its limitations.[7] I think that the Commission could and should have clarified the scope of the 1972

[2] For one commentator's view *see* Rowe, *Price Discrimination Under the Robinson-Patman Act* 414 (1962). Rowe states that the original text of Section 2(d) requiring that proportionally equal treatment be "offered" to all customers was modified to provide only that it be "available." Thus, he argues that mandatory personal solicitation departs from the text (and purpose) of the Act.

[3] The Commission's "reasonableness approach," in which value to the seller could be taken into account, "was echoed in the courts and the Commission for years." ABA Antitrust Section, Monograph No. 4, II The Robinson-Patman Act: Policy and Law 66 (1983). *See also* III E. Kintner & J. Bauer, *Federal Antitrust Law* 557–66 (1983) for a discussion of the change in the Commission's approach.

[4] An example of a value-based approach to proportionality is found in *Lever Bros.*, 50 F.T.C. 494 (1953).

[5] 16 CFR 240.9, Example 1, n.2 (1985) (emphasis added).

[6] 16 CFR 240.7 (1985). Kintner states that the legislative history is ambiguous on this issue. Kinter, *supra*, at 558 n.130.

[7] Kintner, *supra*, at 565–66. Kintner argues that a strict "cost" standard would make implementation of legitimate promotional plans "cumbersome and expensive." *Id.* at 566.

modification before issuing this order.[8] Instead, the majority's approach forces Max Factor to guess the answer—with the prospect of heavy civil penalties for a wrong guess, and considerable uncertainty and legal expenses even for a correct guess.

For all these reasons, I respectfully disagree with the majority's decision to issue this specific consent order. It is indeed ironic that this order may prove to be yet another instance where the Robinson-Patman Act is enforced in a manner that penalizes, rather than protects, smaller competitors.

[8] After all, it may be contended that requiring equal payments to all buyers regardless of the value received by the seller is really a disguised price concession to the buyers who provide the least value. If so, the order could have the effect of forcing Max Factor to engage indirectly in economic price discrimination, which may be contrary to the purpose of Section 2 of the Robinson-Patman Act.

IN THE MATTER OF

ORKIN EXTERMINATING COMPANY, INC.

Docket 9176. Interlocutory Order, Oct. 16, 1986.

NOTICE OF INTENT TO RELEASE *IN CAMERA* INFORMATION

This is to advise Orkin Exterminating Company that, consistent with Section 21(d)(2) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(d)(2)(1982), and Commission Rule 3.45(a), 16 C.F.R. 3.45(a) (1986), the Commission intends to include in the public decisional documents in this proceeding certain information that the Administrative Law Judge received into the *in camera* record. The information that will be made public appears in those portions of the Initial Decision currently filed on the *in camera* record of this proceeding.

In making a determination to release *in camera* information in the course of an adjudicative proceeding, the Commission must balance the potential harm of such release to the protected party against the substantial interest in the public's having available the factual background underlying a Commission decision. Public knowledge of such information permits both improved evaluation of the fairness and wisdom of a given Commission decision and provides clearer guidance to affected parties. *See RSR Corp.*, 88 F.T.C. 206 and 88 F.T.C. 734 (1976).

Here we have concluded that the potential harm to Orkin Exterminating Company from release of the limited information cited above is slight and is outweighed by the value of making the basis of Commission decisions public to the greatest extent possible. In addition, most of the information in question already appears in the public binders of this proceeding rather than, or in addition to, the binder containing *in camera* material. The figures are at least two years old and do not appear to provide sufficient information to competitors to conclude that their release would impose a "clearly defined, serious injury" on Orkin. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). *See also Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), as modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

The information reflected in the portions of the Initial Decision cited above will be placed on the public record of this proceeding no sooner than ten calendar days from service of this notice upon counsel for Orkin Exterminating Company.

IN THE MATTER OF

ELECTRONIC SYSTEMS INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9201. Complaint, Nov. 1, 1985—Decision, Oct. 30, 1986

This consent order requires, among other things, a Norcross, Ga. manufacturer and marketer of "SavIt" duty cyclers to cease making unsubstantiated representations as to the efficiency of its products or services. Additionally, respondents are required to request all dealers of its products to refrain from making the challenged claims and to recall all promotional material that does not conform to the proposed order.

Appearances

For the Commission: *Michael Dershowitz* and *Sandra N. Hammer.*

For the respondents: *R. Hal Meeks, Jr., Petterson, Young, Self & Asselin,* Atlanta, Ga.

COMPLAINT

The Federal Trade Commission, having reason to believe that Electronic Systems International, Inc., a corporation, and Gene B. Patterson, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Electronic Systems International, Inc. is a Georgia corporation with its principal office or place of business at 2797 Peterson Place, Norcross, Georgia.

(b) Gene B. Patterson is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporation.

(c) Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents manufacture, advertise, offer for sale, sell and distribute energy control devices for residential or small commercial use.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. In advertisements, some of which contain graphs and photographs, respondents have made various statements about the energy savings capability of their energy control devices sold under the brand name "SavIt," among others. Typical and illustrative of these statements, but not all-inclusive thereof, are the following from the advertisements attached hereto as Exhibits A and B:

SavIt is designed to reduce your heating and cooling cost 20% or more annually . . .

SavIt will save consumers a minimum of 20% and a maximum of 40% on their annual heating and cooling bills.

SavIt can pay for itself in energy savings in less than 18 months.

Competent and reliable tests or studies have verified the energy-saving claims made for SavIt.

SavIt qualifies for an energy tax credit.

PAR. 5. Through the use of the above statements, and other statements in advertisements not specifically set forth herein, respondents have made the following material representations, directly or by implication:

(1) Use of the SavIt energy control device will save consumers at least 20% and possibly as much as 40% on their annual small commercial or home heating and cooling bills.

(2) It can take less than 18 months for consumers to save enough money on their small commercial or home heating and cooling bills by using the SavIt energy control device to recoup the retail cost of the SavIt energy control device.

(3) Competent and reliable tests or studies have verified that consumers will save at least 20% and possibly as much as 40% on their annual small commercial or home heating and cooling bills by using the SavIt energy control device.

(4) SavIt is a qualified energy conservation product according to the U.S. Tax Code, thereby permitting purchasers of the product to obtain a tax credit and reduce their federal income tax liability.

PAR. 6. In truth and in fact:

(1) Consumers will not save 20%, or close to 20%, on their annual small commercial or home heating and cooling bills as a result of using the SavIt energy control device.

(2) Few, if any, consumers can save enough money on their small commercial or home heating and cooling bills by using the SavIt

energy control device to recoup the cost of the SavIt device within 18 months, or close to 18 months.

(3) Energy savings of 20% to 40% on consumers' annual small commercial or home heating and cooling bills due to the use of the SavIt energy control device have not been verified by competent and reliable tests or studies.

(4) SavIt is not a qualified energy conservation product according to the U.S. Tax Code. Therefore, purchasers of SavIt cannot obtain a tax credit or reduce their federal income tax liability by purchasing the product.

Therefore, the representations set forth in Paragraph Five were, and are, false and misleading.

PAR. 7. Through the use of the statements set forth in Paragraph Four, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time of making the representations set forth in Paragraph Five they possessed and relied upon a reasonable basis for those representations.

PAR. 8. In truth and in fact, at the time of the initial dissemination of the representations and each subsequent dissemination, respondents did not possess and rely upon a reasonable basis for making those representations because, *inter alia,* respondents' test protocols and calculations were not designed or conducted in a manner to produce competent, reliable and statistically meaningful results. Therefore, respondents' representations, as set forth in Paragraph Seven, were, and are, false and misleading.

PAR. 9. The acts or practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

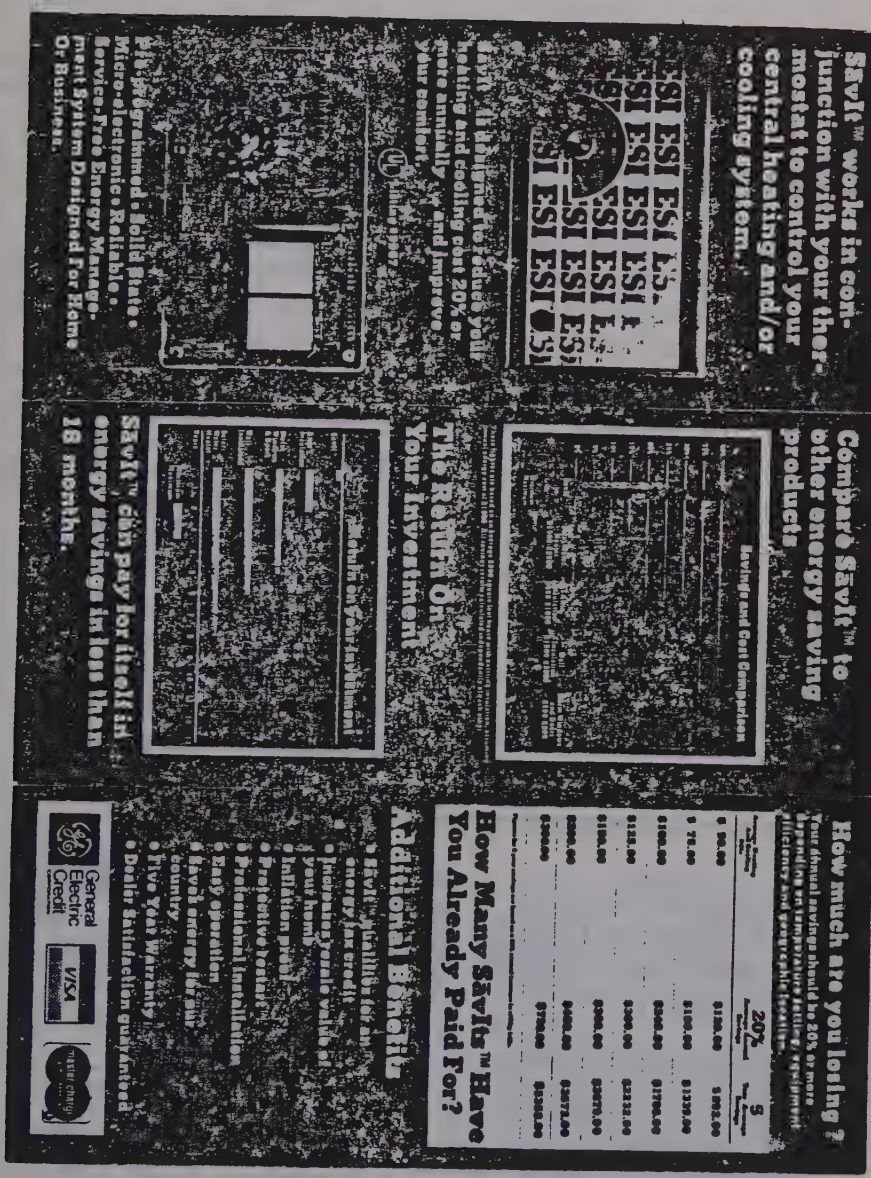

SāvIt™ works in conjunction with your thermostat to control your central heating and/or cooling system.
Compare SāvIt™ to other energy saving products
Savings and Cost Comparison
The Return On Your Investment
SāvIt™ can pay for itself in energy savings in less than 18 months.
How much are you losing?
How Many SāvIts™ Have You Already Paid For?
Additional Benefits
General Electric Credit
VISA
master charge

Exhibit "A"

EXHIBIT B

Exhibit "B"

How much are you LOSING?

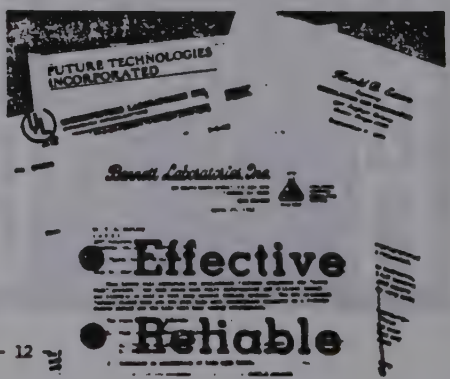
Average Monthly Heating/Cooling Bill	20% Average Annual Savings	5 Year Average Savings
$ 50.00	$120.00	$892.00
$ 75.00	$180.00	$1339.00
$100.00	$240.00	$1786.00
$125.00	$300.00	$2232.00
$150.00	$360.00	$2679.00
$200.00	$480.00	$3572.00
$300.00	$720.00	$5358.00

Figures for 5 year savings are based on a 20% annual increase in utility bills.

Featured In The Energy Saving House Of The 1982 World's Fair

The theme "Energy Turns the World" was chosen by the 1982 World's Fair™ to provide an international focal point for solutions to the world's energy crisis. The Energy Saving House™ of the World's Fair was initiated to show visitors from all over the world the most energy efficient conservation methods and products for homes like yours.

The Product Review Board of the Energy Saving House chose Sirit™ as a practical, reliable product that provides immediate answers to residential energy conservation. It is the only home and light commercial energy management system chosen to be displayed in the Energy Saving House.



Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Electronic Systems International, Inc. is a Georgia corporation with its principal office and place of business at 2797 Peterson Place, Norcross, Georgia.

Respondent Gene B. Patterson is an officer of the corporate respondent. He actively participated in the advertising practices which are the subject of the complaint issued by the Federal Trade Commission. His address is the same as that of the corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

Definitions

For purposes of this order, the following definitions shall apply:

Energy-related claim means any general or specific, oral or written representation that, directly or by implication, describes or refers to

energy savings, energy cost savings, efficiency or conservation, "payback," or "payback" potential.

A *competent and reliable test* means any scientific, engineering, laboratory, or other analytical report, study or survey prepared by one or more persons with skill and expert knowledge in the field to which the material pertains and based on testing, evaluation and analytical procedures that ensure accurate, reliable and statistically meaningful results.

Small commercial heating and cooling systems are similar to residential, central forced air type systems.

A *duty-cycler* (sometimes referred to as a *cyclic controller*) means any electronic device which:

(a) functions to interrupt a thermostatically-controlled cycle of any single, residential or small commercial, forced air central heating or air conditioning unit; or which

(b) may be incorporated in any other product, such as a setback thermostat, to function in the manner described in (a) above.

Respondents market their duty-cycler under the brand name "Sav-It"™, among others.

A *duty-cycler* is not:

(a) a residential setback thermostat; or

(b) an energy load management or control device used in large commercial or industrial settings to turn off a series of electrical heating, cooling, or ventilating equipment for predetermined periods of time during operating hours to reduce consumption and demand (*i.e.*, the rate at which electric energy is delivered to the series of equipment.)

PART I

It is ordered, That respondents Electronic Systems International, Inc., a corporation, its successors and assigns, and its officers, and Gene B. Patterson, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any duty-cycler or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, in any manner that:

(1) Consumers will save 20%, or close to 20%, on their annual small

commercial or home heating and cooling bills as a result of using a duty-cycler, as defined herein.

(2) More than a few consumers may be able to save enough money on their small commercial or home heating and cooling bills by using respondents' duty-cycler, as defined herein, to recoup a retail cost of approximately $400 within 18 months, or close to 18 months.

(3) More than a few consumers may be able to save enough money on their small commercial or home heating and cooling bills by using any duty-cycler, as defined herein, costing approximately $400 to recoup such cost within 18 months, or close to 18 months.

(4) Consumers can obtain a federal tax credit or reduce their federal income tax liability, by purchasing a duty-cycler, as defined herein, unless such is the case.

B. Making any energy-related claim for any duty-cycler, or any other product or service, unless at the time that the claim is made, respondents possess and rely upon a competent and reliable test or other objective material which substantiates the claim.

C. Misrepresenting, directly or by implication, in any manner, the purpose, content, or conclusion of any test, study, or survey upon which respondents rely as substantiation for any energy-related claim, or making any representation which is inconsistent with the results or conclusions of any such test, study or survey.

PART II

It is further ordered, That respondents Electronic Systems International, Inc., a corporation, its successors and assigns, and its officers, and Gene B. Patterson, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any duty-cycler or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, for at least three years from the date of the last dissemination of energy-related claims, maintain and upon request make available to Federal Trade Commission staff for inspection and copying, copies of:

1. all materials relied upon to substantiate any energy-related claim; and

2. all test reports, studies, surveys or demonstrations in their possession that contradict, qualify, or call into question any energy-related claim.

PART III

It is further ordered, That respondents shall:

A. Within thirty (30) days after the date of service of this order, send the following material via first class mail to every person or firm that is a current distributor or dealer of respondents' duty-cycler equipment:

1. a copy of this order, and
2. a copy of the cover letter attached to this order as Attachment A, incorporated herein by reference.

B. Distribute a copy of this order to each of respondents' operating divisions, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertisements or other sales materials.

C. Supply to the Federal Trade Commission upon request the names and addresses of those parties to whom respondents distributed the material required by Paragraphs A and B of Part III of this order.

PART IV

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

PART V

It is further ordered, That each individual respondent named herein shall for a period of 3 years from the date of service of this order, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment whose activities include the manufacture, advertising, promotion, offering for sale, sale, or distribution of energy control devices and of his affiliation with any new business or employment in which his own duties and responsibilities involve the manufacture, advertising, promotion, offering for sale, sale, or distribution of energy control devices, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment.

PART VI

It is further ordered, That respondents shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order.

ATTACHMENT A

ELECTRONIC SYSTEMS INTERNATIONAL, INC. LETTERHEAD

Re: Settlement with Federal Trade Commission

Dear Electronic Systems International, Inc. Dealer:

As a result of a Federal Trade Commission investigation of advertising claims for our duty-cycler product, we have entered into the enclosed Settlement Agreement and Order. The Agreement is for settlement purposes only and does not constitute an admission that we violated the law. At issue in the investigation were a number of energy cost savings, payback and federal energy tax credit claims.

We have agreed to stop making certain claims in the future and to refrain from using all promotional material that may contain such claims. In order to ensure that such claims will no longer be made, we request that you refrain from making them, either orally or in writing, and from distributing any literature in your possession which does not conform to the enclosed agreement. Please return to us any promotional literature or film concerning the duty-cycler and we will replace it with updated literature and an edited film as appropriate.

Thank you for your assistance in this matter.

Sincerely,

President
Electronic Systems International, Inc.

IN THE MATTER OF

GCS ELECTRONICS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3202. Complaint, Oct. 30, 1986—Decision, Oct. 30, 1986

This consent order prohibits, among other things, a Costa Mesa, Calif. electronics company from making unsubstantiated claims about the capabilities of its portable "Mark II Executive Phone."

Appearances

For the Commission: *Steven A. Shaffer* and *Joel Winston.*

For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that GCS Electronics, Inc., a corporation, and Gene Comfort, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. GCS is a California corporation, with its offices and principal place of business at 3200 Park Center Drive, 7th Floor, Costa Mesa, California.

Respondent Gene Comfort is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His office and principal place of business is the same as that of the corporation.

Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents manufacture, advertise, offer for sale, and sell mobile radiotelephones and mobile radiotelephone equipment, including the GCS Executive Phone Mark II ("Mark II").

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. Typical of respondents' advertisements for the Mark II, but not necessarily all-inclusive thereof, are attached hereto as Attach-

ments A and B. The aforesaid advertisements contain the following statements:

(a) up to 50 mile (80 kilometer) range.

(b) 50 MILE RANGE—

With your new Mark II, you enjoy an incredible up to 50–mile receiving range - 80 kilometers - an unheard of over 1200 square mile coverage in each city!

This range, which varies somewhat plus or minus depending upon local conditions, is measured on a diameter usually from the center of your town or almost any city or town you happen to be visiting.

(c) You merely answer and talk direct as you would on any other telephone, a very easy operation.

(d) It is not a CB. It's not a walkie-talkie.

PAR. 5. Through the use of the statements referred to in Paragraph Four (a)-(b) and others in advertisements not specifically set forth herein, respondents have represented, directly or by implication, that:

(a) An appreciable number of users of the Mark II will achieve a range of 50 miles or close to 50 miles, measured between the user and the center of almost any city or town in the United States, under circumstances reasonably foreseen by consumers.

(b) Every user of the Mark II will achieve a range reasonably close to 50 miles.

(c) Every user of the Mark II will achieve a coverage of at least 1200 square miles in each city.

(d) The Mark II allows the user to transmit and receive messages simultaneously.

PAR. 6. In truth and in fact,

(a) few, if any, consumers using the Mark II will achieve a range of 50 miles or close to 50 miles under reasonably foreseen circumstances.

(b) Not every user of the Mark II will achieve a range reasonably close to 50 miles.

(c) Not every user of the Mark II will achieve a coverage of at least 1200 square miles in each city.

(d) The Mark II does not allow the user to transmit and receive messages simultaneously.

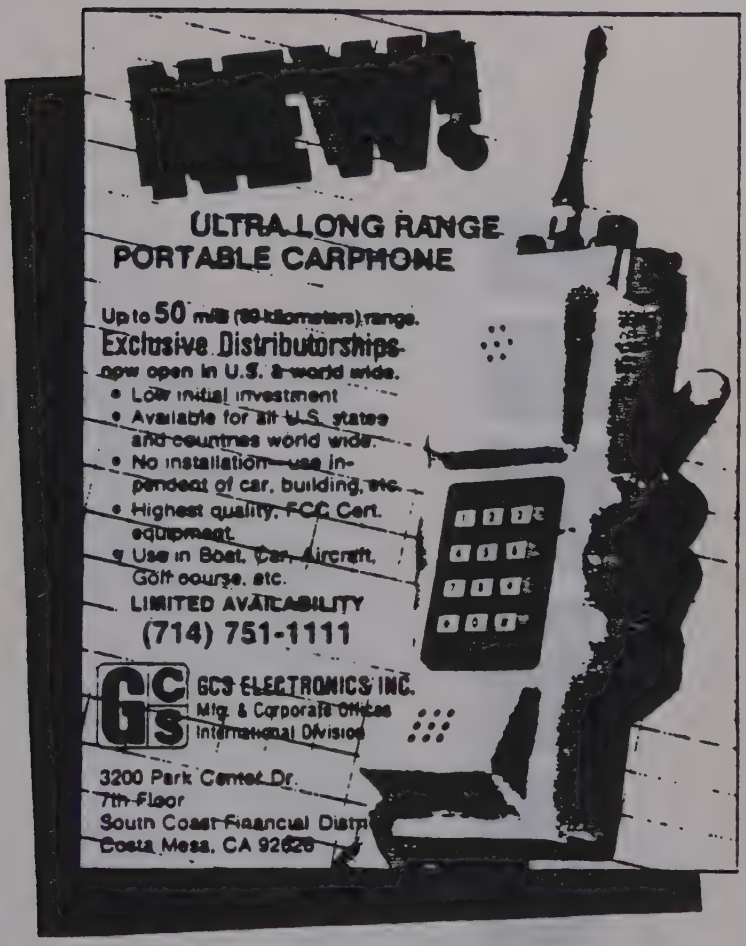
Therefore, respondents' representations as set forth in Paragraph Five were and are false and misleading.

PAR. 7. Through the use of the statements and representations set forth in Paragraphs Four and Five and others not specifically set forth herein, respondents have represented, directly or by implication, that they possessed and relied upon a reasonable basis for such representations at the time they made the representations.

PAR. 8. In truth and in fact, at the time respondents made these representations, respondents did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representations as set forth in Paragraph Seven were and are false and misleading.

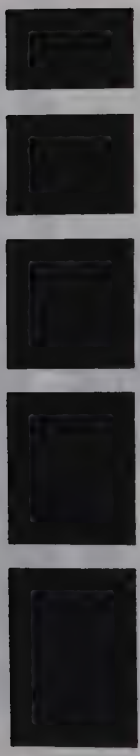
PAR. 9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

ATTACHMENT A


NEW
ULTRA LONG RANGE
PORTABLE CARPHONE
Up to 50 mile (80 kilometers) range.
Exclusive Distributorships
now open in U.S. & world wide.
• Low initial investment
• Available for all U.S. states and countries world wide.
• No installation—use independent of car, building, etc.
• Highest quality, FCC Cert. equipment.
• Use in Boat, Car, Aircraft, Golf course, etc.
LIMITED AVAILABILITY
(714) 751-1111
GCS ELECTRONICS INC.
Mfg. & Corporate Offices
International Division
3200 Park Center Dr.
7th Floor
South Coast Financial Distr
Costa Mesa, CA 92626

ATTACHMENT A

ATTACHMENT B



The Portable
Executive
Communicator

MARK II

ATTACHMENT B

MARK II GCS Executive Phone

Everything you've ever wanted in your own personal go-everywhere communications system.

WORKS LIKE A DREAM

It is a dream come true. Executive Phone Mark II is the telephone system you've always dreamed of, but never thought you'd see in your lifetime.

Imagine yourself relaxing at your favorite hideaway, in or near your city, is today the day you'll receive the important call you've been waiting for — the one that will net you thousands, even hundreds of thousands of dollars?

You don't know, but you're prepared. You take your Mark II with you everywhere, in the car, to restaurants, out on the golf course, in office buildings, day or night, everywhere.

Now! There it is! There's that vital call! You didn't miss it, thanks to your Executive Phone Mark II. It alerted you immediately with a gentle electronic tone!

Isn't this the communications tool you've always wanted? A phone with no external wires at all? A phone on which people can reach you, you can reach them — indoors or out — in almost any city?

YES, THE MARK II IS EXPENSIVE

Highly sophisticated spacelage technology makes GCS Executive Phone a miracle not everyone can afford. But if you can afford it, you're probably successful enough, and your time valuable enough, you can scarcely afford to be without it.

You are one of those fortunate few who have arrived. You increase both your efficiency and your pleasure with the Executive Phone. Call your office from the board room, in a skyscraper clear across town. Receive important messages while dining at a restaurant. Make appointments from your car. Close a contract from the dock at your marina. Play a worthy round of golf, knowing you won't miss that important call. Check on your stocks while sitting on the beach. Put your deadline to work, change an appointment while waiting in a line at the airport.

If you're this caliber of person, you can doubtless add appreciably to your success, and that of your company with this extraordinary communications tool.

But the clincher is the fantastic speed of light range — the feature that make GCS Executive Phone the most versatile communications tool of this century.

50-MILE RANGE —

With your new Mark II you enjoy an incredible up to 50-mile receiving range — 80 kilometers — an unheard of over 1,200 square mile coverage in each city!

This range, which varies somewhat plus or minus depending upon local conditions, is measured on a diameter usually from the center of your town or almost any city or town you happen to be visiting. And it matters little where you are — in the basement, in an underground parking garage, in the very center of a large shopping center — there's virtually no escape for Executive Phone's powerful and sophisticated electronics. However, if you wish privacy, merely switch off your Mark II and a secretary will automatically answer all your calls holding messages for you.

USE IN ALL 50 STATES

GCS Executive Phone can be used on many services located in all cities throughout the United States including Alaska and Hawaii. Just punch the button on your hand-held transmitter receiver to call direct from any of thousands of U.S. cities.

Your hook up is only $30.94/a month (average) — we will assist in registering you! Any long distance calls you make are charged at a normal rate. Some areas may add a small per minute charge, however all expenses are a write-off if business related.

USE INTERNATIONALLY

Do you travel abroad? With adjustments your Mark II can be used in any country of the world — even those that have no telephone connect facilities. GCS has a complete assortment of auxiliary equipment that permits your Executive Phone to be used with any telephone system on any continent.

PRIVATE UNLISTED NUMBER

You don't have to be a radio operator, CBer, manipulate a lot of buttons, or have any technical training to use the Mark II. In fact, no license is necessary. Callers reach you on your own private unlisted number. You merely answer and talk direct as you would on any other telephone, a very easy operation.

People can call you you can call them, whether you're at your home base city or traveling elsewhere.

A ONE-OF-A-KIND INSTRUMENT

The GCS Executive Phone Mark II is not to be confused with any other kind of communications device. It is not a CB. It's not a walkie-talkie. It's not one of those short-range portables selling for less money, that you can carry only as far as you back-yard pool.

The Mark II is a highly sophisticated spacelage long-range instrument that keeps you in communication with important matters all over the entire city. It is the only equipment of its kind, and it eliminates the need for car phones or beepers.

EXECUTIVE FEATURES

The instrument you see pictured is all there is to the Mark II. It's all self contained. There's no cradle, no instrument base, nor any other kind of auxiliary equipment to carry with you. The antenna is virtually internal, there's no long mast to see out.

The complete Executive Phone weighs only 2 pounds. Ounces of kilograms. It can be carried out of sight — in your pocket, pretcase, glove compartment, or golf bag — until that important call comes in.

The Mark II has special features such as a control you can turn up so a roomful of people can hear a conference call — or that you can turn way down for complete privacy. But for most functions, the instrument has the standard push buttons you're used to using on any touch telephone.

In short, the Mark II has the features you want:

- Direct Dial*
- Single Touch Operator
- Totally Portable
- Rechargeable Battery
- 6 Channels
- FCC Approved
- No Wires of Any Type
- Full Year Warranty
- Immediate Delivery
- Microcircuitry Technology
- Available Throughout the U.S.
- International Modes Available

TAX WRITE-OFF

That's another big benefit. If you use your new GCS Executive Phone for business, you can deduct phone calls, service charges, interest expense, depreciation, and long fees. The first year you can take a 7% investment tax credit and deduct it from any taxes due. The investment tax credit alone will probably give you free use of the instrument the first year. Check with you accountant on these matters.

* [illegible]

ATTACHMENT B

Incredible Power
Up to
50 Mile
Range
Worldwide
ATTACHMENT B

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent GCS Electronics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 3200 Park Center Drive, 7th Floor, in the City of Costa Mesa, State of California.

Respondent Gene Comfort is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

Definition

Range-related claim means any general or specific, oral or written representation that, directly or by implication, describes or refers to the distance over which a radiotelephone communications device will receive and transmit signals that are of commercially useable quality.

I.

It is ordered, That respondents GCS Electronics, Inc., a corporation, its successors and assigns, and its officers, and Gene Comfort, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any mobile telephone or other radiotelephone communications device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing in any manner, directly or by implication, any performance characteristic of any such device unless at the time of such representation, respondents possess and rely upon a reasonable basis for such representation, consisting of competent and reliable evidence which substantiates such representation.

B. Making any range-related claim about any such device which uses the phrase "up to" or words of similar import unless the maximum level of performance can be achieved by an appreciable number of consumers; and further, in any instances where consumers could not reasonably foresee the major factors or conditions affecting the maximum level of performance, cease and desist from failing to disclose clearly and prominently the class of consumers who can achieve the maximum level of performance.

C. Misrepresenting in any manner, directly or by implication, the range or coverage of any such device.

D. Misrepresenting in any manner, directly or by implication, the ability of any such device to transmit and receive messages simultaneously.

II.

It is further ordered, That for three years from the date that the representations to which they pertain are last disseminated, respond-

ents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys or other materials in their possession or control that contradict, qualify or call into question such representation or the basis upon which respondents relied for such representation.

III.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations under this order.

IV.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any obligation arising under this order.

V.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon them, file with the Commission a written report setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BENEFICIAL CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8922. Consent Order, Sept. 12, 1979—Modifying Order, Nov. 3, 1986

The Federal Trade Commission has modified a 1979 consent order (94 F.T.C. 425) by: (1) removing a prohibition on the use of the term "instant tax refund", but requiring respondents to disclose that a fee is involved and to make the refund within five days; (2) deleting a requirement that respondents disclose all terms of their guarantees in ads and replacing it with a provision allowing respondents to disclose that full details can be obtained by reading the guarantee; (3) requiring respondents to disclose that their offer to pay obligations resulting from the companys' errors does not include payment of taxes that its customers owe; (4) modifying a prohibition against advertising the expertise of their tax preparers by allowing claims that can be substantiated; and (5) modifying a prohibition against the disclosure of confidential taxpayer information, by allowing such disclosure if IRS procedures are followed.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On May 28, 1986, Beneficial Corporation, and Beneficial Management Corporation, both Delaware corporations, filed a request to reopen and modify the order entered against them by the Commission on September 12, 1979, in Docket No. 8922 (94 F.T.C. 425).

The request to reopen and modify was placed on the public record and a press release was issued on June 12, 1986. The public comment period ended on July 14, 1986, and two comments were filed. The deadline to rule on petitioners' request has been extended to November 3, 1986.

Petitioners are engaged in the advertising and sale of an income tax preparation service for individual taxpayers. The order: prohibits use of the term "instant tax refund"; requires disclosure of all terms of a guarantee; prohibits a misrepresentation of the reimbursement petitioner will make to consumers in the event of an error and requires a disclosure that petitioner will not reimburse the consumer for additional taxes; makes absolute prohibitions against the implication that more of its customers receive refunds than taxpayers at large; and that their personnel are experts or unusually competent. The order further sets up a format to be followed pertaining to the consumers' consent to use information obtained from them.

Petitioners assert that changed conditions of fact and law and the

public interest require that certain paragraphs of the order be modified. Specifically, they request: that Paragraph 1 be modified so that they can use the term "instant tax refund" under certain circumstances; that Paragraph 2 be modified to limit the terms that must be disclosed in a guarantee; that Paragraphs 5 and 6 be modified to eliminate the absolute prohibitions regarding the percentage of customers who receive refunds and the competency of their personnel, to permit truthful and non-deceptive representations; and that Paragraph 7 be modified to conform to the Internal Revenue Code standard for obtaining the consent of the consumer to use information instead of the format provided in the order.

Paragraph 1 of the Order

Paragraph 1 of the order prohibits use of the term "instant tax refund" or like phrases, unless petitioner discloses that this refund is a "normal" loan with no relationship to the tax refund, and that the taxpayer will be expected to meet the normal qualifications for borrowing. Petitioners state that there has been a change in fact in that they are now able to participate with the Internal Revenue Service in an electronic filing program, in certain market areas, by which the IRS expects to be able to reduce the time for issuing refunds by approximately three weeks. Based on this expectation petitioner arranges with a bank and the taxpayer to have the bank grant the taxpayer an interest free loan in 3 days. There is a charge for this service. The taxpayer agrees to have his refund sent to the bank to repay the loan, and any interest charge by the bank during this period is paid by the petitioner. Petitioner proposes to modify the order so that they can advertise this procedure as an "instant tax refund" without the required disclosures, in those market areas in which they are participating with the IRS in the electronic filing program. The order provision will otherwise stay in effect in areas in which the IRS is not using the program.

When the Commission issued the order it suggested that if petitioners should begin offering a special loan service actually related to the tax refund, they might seek to reopen the order. The Commission agrees with the petitioners that Paragraph 1 should be modified to reflect the stated changed factual condition. However, since there is a charge for the service, and in order to regulate the term "instant", respondents have consented to modify Paragraph 1 to prohibit any implication that there is no charge, and to limit the time within which the taxpayer will receive his loan money.

Paragraph 2

Paragraph 2 prohibits "Using any guarantee without clearly and conspicuously disclosing the terms, conditions and limitations in any such guarantee, or misrepresenting in any manner the terms and conditions of any guarantee." Petitioners state that this could be burdensome in attempting to include all details of a guarantee in a 30-second television commercial. When the order was issued the Commission was concerned about the guarantee that petitioners would reimburse consumers for any interest or penalty charges caused by petitioners' error in the preparation of a tax return but would not pay any additional tax. The Commission wanted this term disclosed and specifically required it in Paragraph 4 of the order. The proposed language would retain the disclosure that petitioners do not pay additional tax in the event of the error but that the consumer should look to the guarantee for all other terms and would read as follows:

Subject to the disclosure required by Paragraph 4, herein, using any guarantee without clearly and conspicuously disclosing the fact that any terms, conditions, or limitations are stated in the guarantee; or misrepresenting in any manner the terms and conditions of any guarantee.

The Commission agrees with the petitioners that it is in the public interest to modify Paragraph 2 since it is burdensome, and the modified paragraph will retain the main condition that the Commission was concerned about and will advise the consumer to read the guarantee for any other conditions. Such a provision should not be deceptive or misleading.

Paragraph 5

Paragraph 5 is an absolute prohibition against any representation that the percentage of respondents' customers who receive tax refunds is greater than the percentage of individual taxpayers at large who receive refunds. Petitioners request that the paragraph be modified so that they can make truthful and non-deceptive representations about the percentage of their customers who receive refunds. Accordingly, they request to add a clause stating ". . . *provided however,* that nothing herein shall prevent truthful and non-deceptive representations with respect to the average percentage of respondents' customers who receive tax refunds."

The Commission agrees that petitioners should be allowed to make truthful and non-deceptive representations. Any deceptive implication is prohibited, but the absolute prohibition is modified so that a

representation that does not cause a deceptive implication may be used.

Paragraph 6

This paragraph is an absolute prohibition against representations about the competence of respondents' tax preparing personnel. Respondents state that there is a change in fact as to the extent of training which the personnel are required to undergo compared to the training required at the time the order was issued. They also cite the change in law with respect to commercial or professional advertising and cite examples of competitors advertising the terms "expert" or "professional". They request that the paragraph be modified to prohibit: "Misrepresenting, in any manner, the competence or the ability of respondents' tax preparing personnel."

The Commission agrees that the extent of training which petitioners' personnel are now required to undergo constitutes a change in fact which justifies modification of the absolute prohibition of this paragraph to prohibit only misrepresentations of competence.

Paragraph 7

Paragraph 7 of the order establishes the format to be followed in obtaining the consent of taxpayers to use information obtained in preparing the tax return. Respondents state that since the order was issued, Section 7216 of the Internal Revenue Code establishes a required format. This accomplishes the same purpose and gives the consumer the same protection, but use of both formats becomes overlapping and burdensome. Moreover, respondents cite the fact that the Commission has amended the *H&R Block* order and the proposed modification is exactly the same language as in the *Block* order. [100 F.T.C. 523 (1982)]

The Commission agrees that compliance with the provisions of the Internal Revenue Code will accomplish the same purpose as the existing order and that respondents should not be required to use two formats, and therefore, agrees that this paragraph of the order should be modified.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) requires that an order be modified or set aside upon a satisfactory showing that changed conditions of law or fact require that the order be altered, modified or set aside. The Commission has concluded that respondents have adequately shown that changed conditions of law and fact require that the order be modified in the manner requested.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on September 12, 1979, is hereby modified to read as follows:

ORDER

It is ordered, That respondents, Beneficial Corporation and Beneficial Management Corporation, corporations, and their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation of income tax returns or the extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Instant Tax Refund" or "Immediate Tax Refund" or like phrases using words of similar import or meaning, unless such phrases are used in connection with an electronic refund program in which the respondents participate in conjunction with the United States Internal Revenue Service; *provided, however,* that such phrases will not be used if a loan is being offered that has no relationship to the individual's income tax refund, or refers to a "normal", "usual", "standard" or "regular" loan by the respondents, or is a loan with respect to which the prospective borrowers will be expected to meet qualifications to borrow which are "normal", "usual", "standard" or "regular" (or words having the same or equivalent meaning) under the respondents' loan qualification criteria; *provided further, however,* that each individual will receive the loan money within five days of applying for the loan, (respondents will not be responsible for any delay caused by the Postal Service), and that no advertisement relating to any such loan represents directly or by implication, contrary to fact, that there is no service charge for the refund program involving a loan.

2. Subject to the disclosure required by Paragraph 4, herein, using any guarantee without clearly and conspicuously disclosing the fact that any terms, conditions, or limitations are stated in the guarantee; or misrepresenting, in any manner, the terms and conditions of any guarantee.

3. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payment results from an error by respondents in the preparation of the tax return; *provided, however,* that it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

4. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for, or obligation resulting from, errors attributable to

respondents in the preparation of tax returns, that respondents will not reimburse the taxpayer for any deficiency payment which results from said errors; *provided, however,* that it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

5. Representing, directly or by implication, that the percentage of respondents' customers who receive tax refunds is demonstrably greater than the percentage of individual taxpayers at large who receive refunds; or misrepresenting, in any manner, the magnitude or frequency of refunds received by respondents' tax preparation customers; *provided, however,* that nothing herein shall prevent truthful and non-deceptive representations with respect to the average percentage of respondents' customers who receive tax refunds.

6. Misrepresenting, in any manner, the competence or ability of respondents' tax preparing personnel.

7. Using information concerning any customers of respondents, including the name and/or address of the customer, obtained as a result of the preparation of the customer's tax return for any purpose which is not essential or necessary for the preparation of said tax return, except as specifically authorized by the Internal Revenue Service pursuant to Section 7216 of the Internal Revenue Code and the regulations promulgated thereunder or by future amendments thereto.

IN THE MATTER OF

ROSWIL, INC.

trading and doing business as

RAMEY SUPER MARKETS

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9172. Complaint, Dec. 16, 1983—Decision, Nov. 12, 1986*

This consent order requires a Springfield, Mo. grocer, among other things, to cease engaging in concerted action that restricts the gathering or reporting of comparative grocery price data. Additionally, respondent is prohibited from: (1) requiring price checkers to buy the surveyed items; (2) denying price checkers the same access to Roswil's stores as customers; and (3) coercing any price checker, publisher or broadcaster into discontinuing price reporting. Further, respondent is required to take several steps to increase the likelihood that price surveys will be resumed in Springfield, Missouri. According to the order, the company must reimburse the local cable television station up to $1,000 of its costs if it decides to broadcast a comparative grocery price program and notify the public that such program will be aired.

Appearances

For the Commission: *Patricia A. Bremer.*

For the respondent: *Donald W. Jones, Hulston, Jones & Sullivan,* Springfield, Mo.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such com-

* Complaint previously published at 104 F.T.C. 526 (1984).

plaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to § 3.25 of its Rules, now in further conformity with the procedure prescribed in § 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Roswil, Inc., is a Missouri corporation, trading and doing business as Ramey Super Markets. Its registered agent is Flavius Freeman, 1–130 Corporate Square, Springfield, Missouri.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

For the purpose of this order, the following definitions shall apply:

A. *Roswil* means Roswil, Inc., its divisions and subsidiaries, officers, directors, representatives, agents, employees, successors and assigns.

B. *Price check* or *price checking* means the collecting, from information available to customers, of retail prices of items offered for sale by any retail grocery store (SIC 5411), which is done neither by nor on behalf of a person engaged in the sale of groceries, and which information is used in price reporting.

C. *Price checker* means any person engaged in price checking.

D. *Price reporting* or *price report* means the dissemination to the public of price checking information through any medium by any person not engaged in the sale of groceries.

E. *Springfield* means the counties of Christian and Greene, Missouri.

F. *Customer* means any individual who enters a retail grocery store for the purpose of grocery shopping, whether or not that individual actually makes a purchase.

G. *Person* means individuals, corporations, partnerships, unincorporated associations, and any other business entity.

H. *Geographic area* means: (1) a Standard Metropolitan Statistical

Area as defined by the Bureau of the Census, U.S. Department of Commerce, as of October 1, 1982; or (2) a county.

I. *Supermarket* means any retail grocery store (SIC 5411) with annual sales of more than one million dollars ($1,000,000.00).

II.

It is ordered, That:

A. Roswil shall forthwith cease and desist from taking any action in concert with any other person engaged in the sale of grocery products which has the purpose or effect of restricting, impeding, interfering with or preventing price checking or price reporting.

B. Except as provided in Paragraphs II.C. and II.D., until September 7, 1989, Roswil shall cease and desist from taking or threatening to take any unilateral action that would:

1. Require price checkers to purchase items to be price checked as a condition of allowing them to price check; or

2. Deny price checkers the same access to Roswil's supermarkets as is provided to customers; or

3. Coerce, or attempt to coerce, any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting.

C. 1. Nothing in Paragraph II.B. shall prevent Roswil from adopting reasonable, non-discriminatory rules governing the number of price checkers in its supermarkets at any one time for the purpose of preventing disruption of Roswil's normal business operations.

2. Nothing in subparagraph II.B.3. shall prevent Roswil from publicly commenting upon or objecting to any price report in which its prices are compared to those of any other grocery retailer.

3. Whenever Roswil believes that conditions exist that justify the exclusion of a price checker, it may submit to the Federal Trade Commission a sworn statement setting forth with particularity the facts that Roswil believes meet such conditions. For purposes of this order, the only conditions justifying the exclusion of a price checker are that another supermarket operator with whose prices Roswil's prices are compared in a price report has knowingly tampered with or manipulated the results of such price report for its own competitive gain either (a) by the use of information wrongfully obtained and not available to all supermarket operators whose prices are being compared, or (b) by inducing any price reporter or price checker to cause false information to be published or broadcast. Following the Federal Trade Commission's actual receipt of such statement, Roswil may exclude the price checkers from its supermarkets in the geographic

area(s) covered by the affected price report for so long as the conditions set forth in Roswil's statement shall exist. In any civil penalty action against Roswil for a violation of subparagraph II.B.2. occurring after notice to the Federal Trade Commission was given by Roswil as provided in this subparagraph, Roswil shall have the burden of proving, by a preponderance of the evidence, that the conditions justifying the exclusion of a price checker as set forth in this subparagraph have been met. In meeting its burden, Roswil may offer evidence only for the purpose of proving the facts set forth in its statement to the Federal Trade Commission. Nothing in this subparagraph shall be construed to be an exception to the prohibitions of Paragraph II.A. of this order.

D. 1. Nothing in Paragraph II.B. shall prohibit Roswil from requiring any company to pay a fee for collecting in its stores information that is not available to customers.

2. Nothing in Paragraph II.B. shall prohibit Roswil from requiring any company to pay a fee for collecting information in its stores, if said company is presently or has been under contract to Roswil to pay such a fee for collecting such information, or if the primary purpose of collection such information is not to disseminate it to the public.

III.

It is further ordered, That, upon the resumption of price reporting by TeleCable of Springfield that is similar in quality and coverage to that broadcast by it prior to October 14, 1981, and that includes any Roswil supermarket, and upon receipt by Roswil of written request for payment from TeleCable, Roswil shall reimburse TeleCable for its actual cost of obtaining a price reporting program up to the amount of two hundred fifty dollars ($250.00) per week. Roswil's obligation under this Part (III) shall terminate either when it has reimbursed TeleCable in the total amount of one thousand dollars ($1,000.00) or three (3) years following the date on which this order becomes final, whichever occurs first. Roswil shall not reimburse TeleCable for costs incurred by TeleCable during any week for which TeleCable's costs are reimbursed by any other person.

IV.

It is further ordered, That, within seven (7) days following the date on which this order becomes final, Roswil shall send a letter, a copy of which is attached here as Exhibit A, together with a copy of this order, to TeleCable of Springfield, informing TeleCable of Roswil's obligations under Parts II and V of this order, TeleCable's rights

under Part III, and the notices that Roswil must receive from TeleCable before certain order provisions become binding upon Roswil.

V.

It is further ordered, That, if at any time during the two years following the date on which this order becomes final, Roswil is notified in writing by TeleCable of Springfield that price reporting that includes any of Roswil's supermarkets has resumed in Springfield:

A. For a period of sixty (60) days following the receipt of such notice, Roswil shall post signs no smaller than 30 inches by 40 inches in a front window in each of Roswil's supermarkets in Springfield, stating:

GROCERY PRICE SURVEY

A price survey comparing prices of selected grocery items at Ramey's and other Springfield grocery supermarkets is being broadcast over cable television. This comparative price survey can be seen on channel _____ and is broadcast from _____ to _____.

B. For a period of sixty (60) days following the receipt of such notice, whenever Roswil places food advertisements of one-half page or larger in any printed advertising medium with circulation of 15,000 or more copies in Springfield, Roswil shall publish an announcement as a part thereof in the same language provided in Paragraph V.A. This announcement shall be no smaller than 3 inches high by 3 inches wide and shall be printed in conspicuous type. In each week in which Roswil does not place a one-half page or larger food advertisement in such printed advertising medium, Roswil shall place this announcement as a display advertisement in any printed advertising medium with circulation of 15,000 or more copies in Springfield.

VI.

It is further ordered, That Roswil shall, within seven (7) days after the date on which this order becomes final, and once a year thereafter for three years, provide a copy of this order to each of its officers actively engaged in the operation of its supermarkets in Springfield and to each manager of a Ramey supermarket located in Springfield, and secure from each such individual a signed statement acknowledging receipt of this order.

VII.

It is further ordered, That Roswil shall, within sixty (60) days after the date on which this order becomes final, file with the Commission a verified written report, setting forth in detail the manner and form in which Roswil has complied with this order. Additional reports shall be filed at such other times as the Commission may by written notice require. Each compliance report shall include all information and documentation as may be required by the Commission to show compliance with this order.

VIII.

It is further ordered, That Roswil shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in it such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation or its retail grocery operations, which may affect compliance obligations arising out of this order.

EXHIBIT A

TeleCable of Springfield
1533 South Enterprise
Springfield, Missouri 65801

Dear Sir or Madam:

This is to notify you that Roswil, Inc. ("Roswil"), which operates Ramey Super Markets in Springfield, Missouri, has entered into a consent order with the Federal Trade Commission in which it has agreed that it will not interfere with efforts by independent parties such as TeleCable of Springfield to engage in price reporting or price checking in Roswil's grocery stores in Springfield. Roswil has agreed that it will not require price checkers to purchase the items being price checked, will not deny price checkers the same access to its supermarkets as is provided to customers, and will not attempt to coerce any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting. The terms of and limitations on Roswil's agreement are set forth in a consent order issued by the Federal Trade Commission, a copy of which is enclosed herewith.

If TeleCable of Springfield institutes a price reporting program similar or superior in quality and coverage to the one broadcast by TeleCable in 1981, and if the program includes any of Roswil's grocery stores in Springfield, Missouri, Roswil will reimburse TeleCable for its actual costs of obtaining price reports, up to the amount of $250 per week, and up to $1,000 in total. Roswil will also place notices in its Springfield grocery stores and in its weekly advertisements, informing consumers of TeleCable's price surveys. The precise terms of Roswil's obligations to place such notices, and to reimburse TeleCable for certain of its costs, are set forth in the enclosed consent order.

In order to receive any funds to which you may be entitled and to effect the placement of the notices described above, please notify Roswil in writing, c/o President, Ramey

Super Markets, 3259 East Sunshine, Springfield, Missouri 65804, stating when the program began or is scheduled to begin, the time and channel on which the survey will be broadcast, and TeleCable's costs, if any, of obtaining the survey information.

Very truly yours,

President
Ramey Super Markets

Enclosure

IN THE MATTER OF

GENERAL RAILWAY SIGNAL CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. (2) OF THE CLAYTON ACT

Docket C-837. Consent Order, Sept. 24, 1964—Modifying Order, Nov. 13, 1986

The Federal Trade Commission has modified a 1964 consent order (66 F.T.C. 882) by permitting American Standard Corp., a successor to original respondent Westinghouse Air Brake, to engage in activities necessary to participate in lawful joint ventures. The FTC found that respondent "has adequately demonstrated that evolving technological and economic factors in the railroad signaling equipment and systems industry have created a competitive need for American Standard to participate in joint ventures . . .".

ORDER MODIFYING CONSENT ORDER
ISSUED SEPTEMBER 24, 1964

On April 8, 1986, American Standard Inc. ("American Standard"), successor to respondent Westinghouse Air Brake Co. ("WABCO"), filed a "Request To Reopen Proceeding and Terminate Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. The Request asks the Commission to reopen the proceeding and vacate the consent order issued September 24, 1964, ("order") in its entirety. In the alternative, the Request asks the Commission to modify the order "to permit conduct that is otherwise permissible under the antitrust laws, including conduct that is reasonably ancillary to the formation or operation of lawful joint ventures, exempt from application of the antitrust laws, or beyond the subject matter jurisdiction of the FTC."

After reviewing the Request and other relevant information, the Commission has concluded that it is in the public interest to modify the order to permit American Standard to engage in conduct that is ancillary to and reasonably necessary for the formation or operation of any joint venture that is lawful under the antitrust laws. American Standard has adequately demonstrated that evolving technological and economic factors in the railroad signaling equipment and systems industry have created a competitive need for American Standard to participate in joint ventures to research, develop and produce integrated railroad systems and to bid for "turnkey" railroad projects. The order's present language, designed to restrain conduct that might facilitate collusive agreements, could be interpreted to prohibit other-

wise lawful joint venture activity. It is in the public interest to modify the order to enable American Standard to participate in otherwise lawful joint venture activity because the competitive injury American Standard will likely suffer if it cannot engage in such lawful activity is not outweighed by any need to retain the order in its current form.[1]

American Standard also seeks modification of the order to clarify that its terms do not prohibit conduct statutorily exempt from application of the antitrust laws or beyond the subject matter jurisdiction of the Commission under Section 5(a) of the Federal Trade Commission Act, as amended. Such limitations, however, already apply to this order and all other orders of the Commission. Therefore, a modification merely to restate existing law is unnecessary.

American Standard has not made an adequate showing that changed conditions of fact or law, or the public interest, require vacation of the order in its entirety. The order contains provisions that enjoin horizontal agreements concerning prices, territories, markets, customers and certain other matters, which are generally *per se* unlawful. American Standard has not demonstrated that these provisions harm its competitive posture and, accordingly, has not demonstrated a need to modify these provisions.

The order contains several other provisions, including restrictions on the use of requirements contracts and cumulative volume discounts and on exchanges of information about price or other terms of sale. The Commission finds that the asserted changes in fact and law relied upon by American Standard do not provide a basis for vacating these provisions.

Although the domestic signaling industry has become less concentrated since the order was entered, the signaling market remains highly concentrated and is dominated, as it was at the time the order was entered, by two firms, one of which is American Standard. Little new entry has occurred since the order was entered, and foreign signaling firms continue to face substantial barriers to entry. Given this continued market structure, the changes in the domestic signaling industry cited by American Standard do not constitute unforeseeable changes in fact sufficient to require termination of the order's provisions prohibiting requirements contracts, cumulative volume discounts and information exchanges.

Asserted changes in law since 1964 also do not require termination of these provisions. The legality of requirements contracts has always

[1] The order's provisions are aimed at horizontal conduct and agreements. The order language prohibiting agreements with "any other person, persons or business entity not a party hereto" is limited by the existing exemption for any "bona fide offer, agreement or transaction with any other person, persons or business entity to purchase or sell railroad signaling and control systems or railroad signaling equipment at prices, terms or conditions of sale independently determined and offered and independently accepted." The new modification for lawful joint venture activities will be a further limitation. The "any other person . . . not a party hereto" language will, in practical effect, mean only vendors of signaling equipment or systems.

been determined by a rule of reason analysis. Although certain factors, such as the extent of market foreclosure, have received different degrees of emphasis under the rule of reason since the order was entered, this does not rise to the level of a change in law sufficient to reopen and vacate the order. The order reflects a determination that the respondents could use requirements contracts to achieve anticompetitive effects, rather than a determination that all requirements contracts are *per se* anticompetitive. Similarly, the cases cited by American Standard with respect to volume discounts do not establish a fundamental change in law requiring modification of the order. These cases merely articulate the statutory defenses provided by Section 2(a) of the Clayton Act, 15 U.S.C. 13(a), as amended, and such defenses are already available under the order even though not explicitly set forth therein. *See FTC v. Ruberoid,* 343 U.S. 470 (1952); *William H. Rorer, Inc.,* Docket No. 8599, 104 F.T.C. 544 (1984). To the extent that such defenses might have been deemed inapplicable because the prohibition of cumulative volume discounts is premised upon the allegations of the complaint that such discounts violated Section 5 of the Federal Commission Act as well as Section 2(a) of the Clayton Act, the Commission, in the public interest, has determined that the statutory defenses should apply.

American Standard also has not identified public interest considerations sufficient to warrant termination of these provisions of the order. The Commission may determine that the public interest requires reopening of an order if the respondent demonstrates that it is competitively disadvantaged by the order. When such a showing is made, the Commission will weigh the reasons favoring the modification against any reasons not to make the modification. American Standard, however, has not made a threshold showing that it is competitively disadvantaged by these provisions, except to the extent that the order may be construed to prohibit lawful joint ventures. Accordingly, the public interest does not require reopening and termination or modification of these provisions.

Accordingly, *it is ordered,* that this order be and it hereby is reopened and that the Commission's order issued on September 24, 1964, be and it hereby is modified to include a new subparagraph (4), at 66 F.T.C. 882, 893 (1964), to read as follows:

(4) Nothing contained in the foregoing paragraphs of the order shall be construed to prohibit respondent WABCO from engaging in any conduct or entering into any agreement that is ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.

IN THE MATTER OF

UNION CARBIDE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C–2902. Consent Order, Sept. 28, 1977—Modifying Order, Nov. 14, 1986

The Federal Trade Commission has modified a 1977 consent order (90 F.T.C. 257) by removing references to welding products and gas welding apparatus. Respondent is no longer in the welding business.

ORDER MODIFYING CONSENT ORDER
ISSUED SEPTEMBER 28, 1977

On May 22, 1986, Union Carbide Corporation ("Carbide") filed a "Request to Reopen Proceeding and Modify Order" ("Request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission Procedures and Rules of Practice, 16 CFR 2.51. The Request asks the Commission to reopen and modify the consent order in Docket No. C–2902. The Request seeks three modifications.

First, Carbide requests that Paragraph I.A.1 of the order be modified to enable it to enter requirements contracts for terms up to five years. The order presently requires that any requirements contracts have initial terms not longer than one year and be terminable annually on not more than 90-day notice. Second, Carbide requests that Paragraph III of the order be modified to enable it to acquire independent distributors of industrial gases upon 30-days prior notice, as opposed to the current requirement that Carbide obtain the prior approval of the Commission for most such acquisitions. Third, Carbide requests that the Commission delete from the order all prohibitions relating to "Welding Products" and "Gas Welding Apparatus."

The Commission has carefully considered Carbide's Request and has concluded that Carbide has not made a satisfactory threshold showing that changed conditions of fact or law or the public interest require Paragraphs I.A.1 or III to be reopened to consider whether these provisions should be modified to allow five-year requirements contracts or distributor acquisitions upon prior notice. However, the Commission has found that reopening the order and deleting references to "Welding Products" and "Gas Welding Apparatus" is warranted by changed conditions of fact and the public interest.

In making these findings the Commission has considered Carbide's

Request, Amerigas Inc.'s comment, and Carbide's response to that comment.

Standard for Reopening a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C–2956, letter to John C. Hart (June 5, 1986), at 4 ("Louisiana-Pacific Letter"). The burden is on the petitioner to make the satisfactory showing of changed conditions required by the statute. Louisiana-Pacific Letter at 5–6. This burden is not a light one in view of the public interest in repose and the finality of the Commission's orders. *See Federated Department Stores, Inc., v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality). If the Commission determines that the petitioner has satisfied this requirement, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. Section 5(b) does not require that the Commission modify any order. S. Rep. No. 96–500, 96th Cong., 2d Sess. 10 (1979).

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C–2916, letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter"). If the respondent satisfies this threshold requirement, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2.

Requested Modification of Paragraph I.A.1 of the Order

The Commission finds that Paragraph I.A.1 of the order should not be reopened at this time. The Commission believes, as a matter of policy, that generally it should refrain from reopening an order provision when there exists reason to believe that a respondent is in violation of the very provision it seeks to modify.

There is substantial reason to believe that Carbide is violating Paragraph I.A.1. The Commission believes that by offering and ex-

ecuting producer pricing agreements ("PPAs"), Carbide has failed to comply with the provision in Paragraph I.A.1 that prohibits Carbide from entering into long term requirements contracts with independent industrial gas distributors.

The Commission has reason to believe that Carbide's violations of the order were not inadvertent, but have been in considerable bad faith. The Commission's files contain evidence that over 40 PPAs were offered or executed pursuant to a program that commenced with the knowledge and approval of senior level corporate executives. These agreements were offered to distributors from 1979, less than two years after the order was entered, to 1985, when the Commission discovered their existence. Although Carbide had previously sought the advice of the Commission's staff with respect to compliance matters, Carbide never sought advice regarding PPAs. The Commission's rules expressly provide a procedure for obtaining such advice. *See* 16 CFR 2.41. Additionally, Carbide never affirmatively disclosed to the Commission such contracts, despite that it was offering and executing PPAs before, during, and after it filed (and later withdrew) a petition in 1983 seeking modification of Paragraph I.A.1 of the order; Carbide's avowed reason for using PPAs is essentially identical to one of its stated needs for modifying the order in 1983. Although Carbide may have perceived a need to enter long term requirements contracts, it chose to effect its own remedies, despite the prohibition contained in the order and the Commission's procedures for order modifications. Accordingly, it would not be in the public interest to reopen Paragraph I.A.1 of the order at this time to consider Carbide's request for modification of that provision.

Additionally, the Commission finds that neither changes of law nor fact require the reopening of Paragraph I.A.1 of the order. Carbide has failed to show any changes in statutory or decisional law that have the effect of bringing the provisions of Paragraph I.A.1 into conflict with existing law. *See System Federation No. 91 v. Wright,* 364 U.S. 642 (1961). Exclusive dealing arrangements always have been subject to a rule of reason analysis. Carbide's asserted changes in law, at most, reflect a shift in focus among the several factors traditionally considered under a rule of reason analysis as applied to exclusive dealing.

Changed factual circumstances justify modification of an order only when the changed circumstances (1) were unforeseeable when the order was entered and result in severe competitive hardship, and (2) virtually eliminate the dangers the order sought to remedy. *Pay Less Drugstores Northwest, Inc.,* Docket No. C–3039, letter to H.B. Hummelt (Jan. 22, 1982) (citing *United States v. Swift & Co.,* 286 U.S. 106, 119 (1932)). The changes that Carbide points to fail to satisfy this

standard. For example, Carbide notes that since 1977: (1) the number of national industrial gas producers has increased; (2) its market share has declined; (3) its competitors have increased their number of independent distributors; and (4) independent distributors possess increased bargaining power. However, Carbide has failed to show that these changes have been significant. For example, according to its own estimates, Carbide's reductions in its market shares have been marginal. Additionally, although Carbide asserts that its share of independent distributors has declined since 1977, the amount of the decline in percentage points is minimal. Carbide has failed to show how these changes reflect more than the normal, foreseeable evolution of the industry or how these changes eliminate any possible continued need for the order.

In sum, the Commission has determined that neither changes in fact nor in law require reopening of Paragraph I.A.1 of the order to consider Carbide's requested modification of that provision. Additionally, the Commission has determined that it would not be in the public interest to reopen Paragraph I.A.1 to consider modification at this time. The public interest is served by denying a request for reopening and modification of an order provision while compliance issues remain unresolved. This action by the Commission will enhance its ability to ensure compliance with this order and other outstanding orders, enhance the deterrent effect of all orders and of Section 5 itself, and serve to discourage "self-help" order modifications. Thus, based on these policy considerations, the Commission finds that the public interest does not warrant reopening and modification of Paragraph I.A.1 of the order.

Requested Modification of Paragraph III of the Order

The Commission finds Carbide has failed to show any changed conditions of law or fact or public interest considerations that require or warrant reopening Paragraph III of the order.

Carbide contends that both changes of law and fact require the reopening of Paragraph III of the order. However, Carbide has failed to point to any change in statutory or decisional law with respect to vertical acquisitions that has the effect of bringing the terms of the order into conflict with existing law. The Commission also notes that, in those instances where prior approval is required, the Commission will analyze such requests in a manner consistent with current law and policy. Thus, any changes regarding the application of the law of vertical restraints will be considered by the Commission when reviewing an application for prior approval.

Carbide also states that modification of Paragraph III of the order is required by changed conditions of fact. The Commission finds that

Carbide has failed to show significant changes in fact that require reopening. Carbide alleges that: (1) the number of national gas producers is increasing; (2) its market share is declining; (3) the number of distributors serving competitors is increasing; and (4) independent distributors' bargaining power has increased. As discussed earlier, Carbide has failed to show that these changes were unforeseeable, or that they reflect more than the natural evolution of the industry. Paragraph III recognizes such evolution as evidenced by the ten-year term of that provision.

Carbide contends that modification of the order to permit vertical mergers after prior notice rather than prior approval would serve the public interest. The Commission finds that neither of the grounds that Carbide raises warrants reopening the order in the public interest. First, Carbide states that the regulatory burden imposed by the prior approval requirement prevents it from competing on equal terms with its competitors. This claim does not warrant relief. Carbide has failed to document any burden imposed by the prior approval requirement that was not foreseeable when the order was issued or how that burden has changed over the years. Additionally, the Commission notes that Carbide has not identified instances in which it was actually prejudiced by the prior approval requirement. Instead, Carbide identifies generally the burden that might be imposed by any prior approval requirement: added costs, uncertainty, and delay. Second, Carbide states that distributors seeking to sell their businesses may face reduced marketing opportunities because Carbide, a likely prospective purchaser, may be foreclosed from making such acquisitions. This concern was presented to and considered by the Commission in 1977. Carbide fails to point to any factual changes that would justify the Commission's treating this consideration differently now. In sum, the Commission finds that the public interest does not warrant reopening the order to consider whether to modify Paragraph III.

Request to Delete References to "Welding Products" and "Gas Welding Apparatus"

The Commission finds that Carbide has made a satisfactory showing of changed conditions of fact to warrant reopening the order to consider deleting references to "Welding Products" and "Gas Welding Apparatus." In 1985, Carbide sold its gas welding apparatus and welding products operations. In the Request, Carbide states its intention not to reenter that line of business. The Commission finds that deleting references to "Welding Products" and "Gas Welding Apparatus" is warranted by changed conditions of fact and by the public interests.

Accordingly, *it is ordered,* that this matter be reopened with respect to Carbide's third request and that Paragraphs I, III, and IV of the

Commission's order in Docket No. C–2902, issued on September 28, 1977, be modified, as of the date of service of this order, to read as follows:

I.

It is ordered and directed, That for a period of twenty (20) years from the date of service of this order, respondent Union Carbide Corporation (hereinafter Union Carbide), its subsidiaries, divisions, affiliates, successors, and assigns, in connection with the distribution, offering for sale, or sale of industrial gases to distributors in which it owns less than a majority interest, shall:

A. Not offer, renew, extend or enter into any contracts or agreements, or enforce directly or indirectly those provisions of any contract or agreement, which require any distributor:

1. To purchase from Union Carbide all or any part of its requirements of any industrial gas unless (a) the initial term of such contract or agreement is one year or less, and (b) such contract or agreement may be terminated by either party effective on any anniversary date upon written notice given some minimum period in advance of such date as set forth in such contract, such minimum period to be not more than ninety (90) days; or

2. To purchase from Union Carbide all or any part of its requirements of any industrial gas at one or more locations as a condition to being permitted to purchase from Union Carbide such industrial gas at another location; or

3. To purchase from Union Carbide all or any part of its requirements of any industrial gas at any location as a condition to being permitted to purchase from Union Carbide any other industrial gas at the same or any other location.

B. Not refuse to sell, subject to Paragraph A.1 above, industrial gases to a Union Carbide distributor because that distributor refuses (1) to purchase all or a designated part of its requirements of industrial gases from Union Carbide; or (2) to purchase from Union Carbide all or any part of its requirements of industrial gases at more than one of its locations.

* * * * * * *

III.

A. *It is further ordered,* That for a period of ten (10) years from the date of service of this order, Union Carbide shall not without prior

approval of the Commission, except as otherwise provided in Paragraph B of this Part III, acquire, directly or indirectly, the whole or any part of the assets, stock, share capital of, or other equity interest in, any distributor of industrial gases.

B. No prior approval shall be required under this order for any acquisition by Union Carbide of any assets, stock, share capital of, or other equity interest in, any distributor of industrial gases if such acquisition meets any of the following standards:

1. The acquisition involves only a change in the equity interest of Union Carbide in a distributor in which Union Carbide already holds an equity interest; or

2. Except to the extent such acquisition is covered by clause 3 of this Paragraph B, the consummation of the acquisition does not result in Union Carbide owning an equity interest, obtained by acquisition, in distributors to whom, in the calendar year prior to the calendar year in which such acquisition is consummated, Union Carbide sold in excess of 16 percent of its total sales of industrial gases sold in such year to all acquired and independent distributors; *provided, however,* that no acquisition of a distributor shall be exempt from prior approval under this clause 2 unless the distributor to be acquired purchased from Union Carbide more than 50 percent of its total purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated; or

3. The acquisition is not covered by clause 2 of this Paragraph B, but within twelve (12) months prior to the consummation of such acquisition Union Carbide has divested absolutely and in good faith by sale or spin-off its equity interests in one or more distributors the aggregate dollar value of whose purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated was equal to or in excess of the aggregate dollar value of purchases of industrial gases in such prior calendar year, by the distributor so acquired; *provided, however,* that, to the extent that any purchases by a divested distributor are utilized by Union Carbide in a determination that an acquisition falls within the provisions of clause 2 or 3 of this Paragraph B, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of this clause 3; or

4. The transaction involves only (a) the purchase of products from a distributor in the normal course of business, or (b) the purchase of fixed assets from an independent distributor in a transaction in which the distributor will continue thereafter to carry on its function as an independent distributor in which Union Carbide has no equity interest; or

5. But for the acquisition by Union Carbide, the distributor would have ceased business operations as an industrial gas distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

C. During the period that this Part III is in effect, Union Carbide shall advise the Commission, prior to consummation thereof, of each acquisition of the type described in Paragraph A of this Part III as to which prior approval is not required because of the provisions of Paragraphs B.2 or B.3 of this Part III.

D. During the period that this Part III is in effect, Union Carbide shall, within ninety (90) days from the date of each acquisition described in Paragraph B.5 of this Part III, provide information sufficient for the Commission to determine whether, but for the acquisition by Union Carbide, the distributor would have ceased business operations as an industrial gas distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

IV.

It is further ordered, That if, during the ten (10) year period beginning on the date of service of this order, any distributor of industrial gases in which Union Carbide holds an equity interest acquires, without the prior approval of the Commission to the extent such approval would be required under Part III of this order if such acquisition were made directly or indirectly by Union Carbide, the whole or any part of the assets, stock, or share capital of, or other equity interest in, any distributor of industrial gases, then Union Carbide shall within six (6) months thereafter divest absolutely and in good faith by sale or spin-off its equity interests in one or more distributors, the aggregate dollar value of whose purchases of industrial gases in the prior calendar year was equal to or in excess of the aggregate dollar value of purchases of industrial gases in such prior calendar year by the distributor so acquired; *provided, however,* that to the extent that any purchases by a divested distributor are utilized by Union Carbide in determining compliance with the divestiture provisions of this Part IV, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of Paragraph III B.3 of this order.

Chairman Oliver dissented.

DISSENTING STATEMENT OF CHAIRMAN DANIEL OLIVER

I agree with the Commission's decision to reopen and modify its 1977 consent order with Union Carbide by removing references to welding products and gas welding apparatus. These references are unnecessary, because Union Carbide is no longer a participant in the welding business.

I disagree, however, with the Commission's decision not to reopen for modification Paragraph I.A of the order. Union Carbide requested that the Commission modify Paragraph I.A to allow Union Carbide to enter into long term contracts with gas distributors. Union Carbide has demonstrated that long term contracts are necessary to compete effectively in industrial gas production and supply, that the order's prohibitions on long term contracts place Union Carbide at a competitive disadvantage, and that the public interest would best be served by removing these prohibitions.

The Commission has made clear that Union Carbide's apparent violations of Paragraph I.A played an important role in the Commission's decision not to reopen Paragraph I.A. I strongly advocate vindication of the Commission's orders and I believe that the Commission would be fully justified in seeking appropriate relief for order violations. I also believe, however, that anticompetitive orders breed disrespect for the law, frustrating the Commission's enforcement of legitimate orders. Moreover, and perhaps most important, forcing compliance with errant Commission orders places the Commission in the undesirable position of harming rather than helping consumers.

For this reason, I voted against the Commission's decision to modify the Union Carbide order in part.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9189. Complaint, Dec. 20, 1984—Decision, Dec. 3, 1986*

This consent order prohibits, among other things, twenty six Detroit, Mich.-area Chevrolet associations, dealerships and dealers from conspiring to not advertise in the classified sections of newspapers or to not advertise vehicle prices at all.

Appearances

For the Commission: *Dennis F. Johnson, Robert C. Jones, Richard B. Smith, Richard A. Wolff, Timothy Suich* and *Morris Bloom.*

For the respondents: *Lawrence F. Raniszeski* and *Robert Y. Weller, Colombo & Colombo,* Birmingham, Mich. and *James F. Rill, Jeffrey W. King* and *Christopher J. MacAvoy, Collier, Shannon, Rill & Scott,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent parties named in the caption hereof, and hereinafter more particularly described and designated as "respondents," have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Each of the parties described below is hereby named as a respondent herein in the capacity set forth in the caption to this complaint. Each respondent named in his capacity as an officer of a corporate respondent formulates, directs and controls the acts and practices of said corporate respondent.

* The complaint was issued against associations, dealerships and dealers for Chrysler-Plymouth and Cadillac, as well. For the decisions issued against these respondents *see* 108 F.T.C. 243 and 249.

Respondent name	Principal place of business
Detroit Auto Dealers Association, Inc.	3290 W. Big Beaver Road, Troy, MI 48084
James Daniel Hayes	3290 W. Big Beaver Road, Troy, MI 48084
Tri-County Pontiac Dealers Association, Inc.	16000 W. Twelve Mile Road, Southfield, MI 48076
*Greater Detroit Chevrolet Dealers Association, Inc.	100 Renaissance Center, Suite 3100, Detroit, MI 48243
*Chrysler-Plymouth Dealers Association of Greater Detroit, Inc.	32711 Van Dyke, Warren, MI 48093
Greater Detroit Dodge Dealers Association, Inc.	24211 Gratiot Avenue, East Detroit, MI 48021
Metro Detroit AMC Dealers Association, Inc.	13600 Greenfield Road, Detroit, MI 48227
Metro Detroit Buick Dealers Association, Inc.	100 Renaissance Center, Suite 3100, Detroit, MI 48243
*Metro Detroit Cadillac Dealers Association, Inc.	100 Renaissance Center, Suite 3100, Detroit, MI 48243
Metropolitan Detroit Ford Dealers, Inc.	24760 W. Seven Mile Road, Detroit, MI 48219
Metropolitan Detroit Oldsmobile Dealers Association, Inc.	100 Renaissance Center, Suite 3100, Detroit, MI 48243
Metropolitan Lincoln-Mercury Dealers Association, Inc.	1950 W. Maple Road, Troy, MI 48084
Southeastern Michigan Volkswagen Dealers Association, Inc.	23615 Michigan Avenue, Dearborn, MI 48124
*Metro Detroit Chevrolet Dealers Association, Inc.***	100 Renaissance Center, Suite 3100, Detroit, MI 48243
*Chrysler-Plymouth Advertising Association of Greater Detroit, Inc.***	32711 Van Dyke, Warren, MI 48093
Metro Detroit AMC Advertising Association, Inc.	13600 Greenfield Road, Detroit, MI 48227
Metro Detroit Buick Dealers Advertising Association, Inc.**	100 Renaissance Center, Suite 3100, Detroit, MI 48243
Metro Detroit Ford Dealers Advertising Fund, Inc.	24760 W. Seven Mile Road, Detroit, MI 48219
Metropolitan Lincoln-Mercury Dealers Advertising Association, Inc.	1950 W. Maple Road, Troy, MI 48084
Tri-County Detroit Dodge Dealers Association, Inc.	24211 Gratiot Avenue, East Detroit, MI 48021
Barnett Pontiac-Datsun, Inc.	14505 Michigan Avenue,Dearborn, MI 48126
Robert F. Barnett	14505 Michigan Avenue, Dearborn, MI 48126
Jim Causley Pontiac-GMC Truck, Inc.	38111 Gratiot Avenue, Mt. Clemens, MI 48043
James F. Causley, Sr.	38111 Gratiot Avenue, Mt. Clemens, MI 48043
Jim Fresard Pontiac, Inc.	400 N. Main Street, Royal Oak, MI 48067
F. James Fresard	400 N. Main Street, Royal Oak, MI 48067
Red Holman Pontiac-Toyota-GMC Truck Co.	35300 Ford Road, Westland, MI 48185
Albert A. Holman	35300 Ford Road, Westland, MI 48185
Art Moran Pontiac-GMC, Inc.	29300 Telegraph Road, Southfield, MI 48034
Arthur C. Moran	29300 Telegraph Road, Southfield, MI 48034

Respondents designated with "" are charged under both Count I and Count II of the complaint. The other respondents are charged only under Count I.

Respondents designated with "" have had the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

*** Respondents designated with "***" have had Count II of the Complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondent name	Principal place of business
Packer Pontiac Co.	500 S. Opdyke Road, Pontiac, MI 48057
William M. Packer, Jr.	500 S. Opdyke Road, Pontiac, MI 48057
Rinke Pontiac-GMC Co.	27100 Van Dyke Avenue, Warren, MI 48093
Roland Rinke	27100 Van Dyke Avenue, Warren, MI 48093
Bob Sellers Pontiac-GMC, Inc.	38000 Grand River Avenue, Farmington Hills, MI 48018
Robert B. Sellers	38000 Grand River Avenue, Farmington Hills, MI 48018
Shelton Pontiac-Buick, Inc.	855 S. Rochester Road, Rochester, MI 48063
C.M. (Bud) Shelton	855 S. Rochester Road, Rochester, MI 48063
Yvon J. Tessier**	16100 Fort Street, Southgate, MI 48195
Porterfield Wilson Pontiac-GMC Truck, Inc.	18650 Livernois, Detroit, MI 48221
Poterfield Wilson	18650 Livernois, Detroit, MI 48221
Woody Pontiac Sales, Inc.	12140 Joseph Campau, Hamtramck, MI 48212
Woodrow W. Woody	12140 Joseph Campau, Hamtramck, MI 48212
*Jack Cauley Chevrolet, Inc.	7020 Orchard Lake Road, West Bloomfield, MI 48033
*John H. Cauley	7020 Orchard Lake Road, West Bloomfield, MI 48033
*Dexter Chevrolet Co.	20811 W. Eight Mile Road, Detroit, MI 48219
*Joseph B. Slatkin	20811 W. Eight Mile Road, Detroit, MI 48219
*Dick Genthe Chevrolet, Inc.	15600 Eureka Road, Southgate, MI 48195
*Richard E. Genthe	15600 Eureka Road, Southgate, MI 48195
Bernie Hout Chevrolet, Inc.**	35500 S. Gratiot Avenue, Mt. Clemens, MI 48043
Bernard C. Houthoofd**	35500 S. Gratiot Avenue, Mt. Clemens, MI 48043
James-Martin Chevrolet, Inc.	6250 Woodward Avenue, Detroit, MI 48202
James P. Large	6250 Woodward Avenue, Detroit, MI 48202
*Jefferson Chevrolet Co.	2130 E. Jefferson Avenue, Detroit, MI 48207
James P. Tellier	2130 E. Jefferson Avenue, Detroit, MI 48207
Raymond R. Tessmer	2130 E. Jefferson Avenue, Detroit, MI 48207
*Lou LaRiche Chevrolet-Subaru, Inc.	40875 Plymouth Road, Plymouth, MI 48170
*Louis H. LaRiche	40875 Plymouth Road, Plymouth, MI 48170
*Walt Lazar Chevrolet, Inc.	12000 Telegraph Road, Taylor, MI 48180
Walter N. Lazar	12000 Telegraph Road, Taylor, MI 48180
John W. Lazar**	12000 Telegraph Road, Taylor, MI 48180
Stephen R. Jasinski**	12000 Telegraph Road, Taylor, MI 48180
Jack Meyers**	12000 Telegraph Road, Taylor, MI 48180
Glen D. Cole**	12000 Telegraph Road, Taylor, MI 48180
*Mark Chevrolet, Inc.	33200 Michigan Avenue, Wayne, MI 48184
*Harry C. Demorest	33200 Michigan Avenue, Wayne, MI 48184
*George Matick Chevrolet, Inc.	14001 Telegraph Road, Redford, MI 48239
George S. Matick, Jr.	14001 Telegraph Road, Redford, MI 48239
*Matthews-Hargreaves Chevrolet Co.	1616 S. Main Street, Royal Oak, MI 48067

Respondents designated with "" are charged under both Count I and Count II of this complaint. The other respondents are charged only under Count I.

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Respondents designated with "" have had Count II of the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondent name	Principal place of business
W. Robert Allen	1616 S. Main Street, Royal Oak, MI 48067
*Merollis Chevrolet Sales & Service	21800 Gratiot Avenue, East Detroit, MI 48021
*Norman A. Merollis	21800 Gratiot Avenue, East Detroit, MI 48021
*Ed Rinke Chevrolet-GMC Co.	26125 Van Dyke, Center Line, MI 48015
Edgar Rinke, Sr.**	26125 Van Dyke, Center Line, MI 48015
*Mike Savoie Chevrolet, Inc.	1900 W. Maple Road, Troy, MI 48084
Myron P. Savoie	1900 W. Maple Road, Troy, MI 48084
*Les Stanford Chevrolet, Inc.	21711 Michigan Avenue, Dearborn, MI 48123
Leslie J. Stanford	21711 Michigan Avenue, Dearborn, MI 48123
Stewart Chevrolet, Inc.	23755 Allen Road, Woodhaven, MI 48183
Gordon L. Stewart	23755 Allen Road, Woodhaven, MI 48183
*Tennyson Chevrolet, Inc.	32570 Plymouth Road, Livonia, MI 48150
*Harry Tennyson	32570 Plymouth Road, Livonia, MI 48150
*Buff Whelan Chevrolet, Inc.	40445 Van Dyke, Sterling Heights, MI 48078
*Robert F. Whelan**	40445 Van Dyke, Sterling Heights, MI 48078
*Bill Wink Chevrolet/GMC/Isuzu	10700 Ford Road, Dearborn, MI 48126
*William J. Wink, Jr.	10700 Ford Road, Dearborn, MI 48126
Michael P. Chinavare**	23951 Plymouth Road, Detroit, MI 48239
Greenfield AMC/Jeep-Renault, Inc.	13600 Greenfield Road, Detroit, MI 48227
Naiff H. Kelel	13600 Greenfield Road, Detroit, MI 48227
Zigmund F. Mielnicki	32899 Van Dyke Road, Warren, MI 48093
Villiage AMC/Jeep, Inc.	666 S. Woodward Avenue, Birmingham, MI 48011
Armstrong Buick-Opel, Inc.	30500 Plymouth Road, Livonia, MI 48150
Thomas Armstrong	30500 Plymouth Road, Livonia, MI 48150
Jim Carney Buick Co.	24231 Van Dyke, Center Line, MI 48015
Harold Dietrich, Inc.**	3939 S. Wayne Road, Wayne, MI 48184
Fischer Buick-Subaru, Inc.	1790 Maplelawn, Troy, MI 48084
Carl E. Fischer**	1790 Maplelawn, Troy, MI 48084
Bill Greig Buick-Opel, Inc.	600 S. Main Street, Royal Oak, MI 48067
William R. Greig, Sr.	600 S. Main Street, Royal Oak, MI 48067
Krajenke Buick Sales, Inc.	12801 Joseph Campau, Detroit, MI 48212
Clarence Krajenke	12801 Joseph Campau, Detroit, MI 48212
Mitchell Buick Sales, Inc.**	165 N. Gratiot Avenue, Mt. Clemens, MI 48043
Tamaroff Buick-Honda, Inc.	28585 Telegraph Road, Southfield, MI 48034
Marvin Tamaroff	28585 Telegraph Road, Southfield, MI 48034
*Audette Cadillac, Inc.	7100 Orchard Lake Road, West Bloomfield, MI 48033
*Charles Audette	7100 Orchard Lake Road, West Bloomfield, MI 48033
*Frank Audette	7100 Orchard Lake Road, West Bloomfield, MI 48033
*Crissman Cadillac, Inc.	1350 N. Woodward Avenue, Birmingham, MI 48011
*Charles Dalgleish Cadillac-Peugeot, Inc.	6160 Cass Avenue, Detroit, MI 48202

Respondents designated with "" are charged under both Count I and Count II of ths complaint. The other respondents are charged only under Count I.

Respondents designated with "" have had the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondents designated with "" have had Count II of the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondent name	Principal place of business
*Charles Dalgleish, Jr.	6160 Cass Avenue, Detroit, MI 48202
*Douglas Dalgleish	6160 Cass Avenue, Detroit, MI 48202
*Dreisbach & Sons Cadillac Co.	24600 Grand River Avenue, Detroit, MI 48219
*Thomas S. Dreisbach	24600 Grand River Avenue, Detroit, MI 48219
*Arnold Jerome Cadillac, Inc.	675 S. Saginaw, Pontiac, MI 48053
*Roger Rinke Cadillac Co.	8333 Eleven Mile Road, Warren, MI 48093
*Roger J. Rinke	8333 Eleven Mile Road, Warren, MI 48093
*Richard Rinke**	8333 Eleven Mile Road, Warren, MI 48093
*McInerney, Inc.***	14100 W. Eight Mile Road, Oak Park, MI 48237
*Martin J. McInerney***	14100 W. Eight Mile Road, Oak Park, MI 48237
*Birmingham Chrysler-Plymouth, Inc.	2100 W. Maple Road, Troy, MI 48084
*Robert M. Brent	32711 Van Dyke Avenue, Warren, MI 48093
Daniel Dwyer**	32711 Van Dyke Avenue, Warren, MI 48093
*Lochmoor Chysler-Plymouth, Inc.	18165 Mack Avenue, Detroit, MI 48224
Justin DeFrancis**	18165 Mack Avenue, Detroit, MI 48224
Dick Green	29301 Grand River Avenue, Farmington, MI 48024
James A. McInerney**	12200 Telegraph Road, Taylor, MI 48180
Thomas M. McInerney, Jr.**	12200 Telegraph Road, Taylor, MI 48180
Thomas M. McInerney, Sr.**	12200 Telegraph Road, Taylor, MI 48180
*Monicatti Chrysler-Plymouth Sales, Inc.	40755 Van Dyke Avenue, Sterling Heights, MI 48078
Northland Chrysler-Plymouth, Inc.	14100 W. Eight Mile Road, Oak Park, MI 48237
John J. McInerney**	14100 W. Eight Mile Road, Oak Park, MI 48237
*Roseville Chrysler-Plymouth, Inc.	25800 Gratiot Avenue, Roseville, MI 48066
*James Riehl	25800 Gratiot Avenue, Roseville, MI 48066
*Bill Snethkamp, Inc.	16400 Woodward Avenue, Highland Park, MI 48203
*William Snethkamp	16400 Woodward Avenue, Highland Park, MI 48203
*Thompson Chrysler-Plymouth, Inc.	16225 Fort Street, Southgate, MI 48195
Joseph P. Thompson	16225 Fort Street, Southgate, MI 48195
*Westborn Chrysler-Plymouth, Inc.	23300 Michigan Avenue, Dearborn, MI 48124

Respondents designated with "" are charged under both Count I and Count II of ths complaint. The other respondents are charged only under Count I.

Respondents designated with "" have had the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondents designated with "" have had Count II of the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondent name	Principal place of business
Colonial Dodge, Inc.	24211 Gratiot Avenue, East Detroit, MI 48021
Arthur J. Roshak	24211 Gratiot Avenue, East Detriot, MI 48021
Crestwood Dodge, Inc.	32850 Ford Road, Garden City, MI 48135
Garrity Motor Sales, Inc.	11500 Joseph Campau, Hamtramck, MI 48212
James A. Garrity	11500 Joseph Campau, Hamtramck, MI 48212
Mt. Clemens Dodge, Inc.	43774 N. Gratiot Avenue, Mt. Clemens, MI 48043
Northwestern Dodge, Inc.	10500 W. Eight Mile Road, Ferndale, MI 48220
Oakland Dodge, Inc.	101 W. Fourteen Mile Road, Madison Heights, MI 48071
Donald Thomson**	101 W. Fourteen Mile Road, Madison Heights, MI 48071
Pointe Dodge, Inc.	18001 Mack Avenue, Detroit, MI 48224
Kenneth Meade	18001 Mack Avenue, Detroit, MI 48224
Sterling Heights Dodge, Inc.	40111 Van Dyke, Sterling Heights, MI 48087
Anthony J. Viviano	40111 Van Dyke, Sterling Heights, MI 48087
Town & Country Dodge, Inc.**	31015 Grand River Avenue, Farmington, MI 48024
John Cueter	31015 Grand River Avenue, Farmington, MI 48024
Van Dyke Dodge, Inc.	28400 Van Dyke, Warren MI 48093
Frank Galeana	28400 Van Dyke, Warren, MI 48093
Avis Ford, Inc.	29200 Telegraph Road, Southfield, MI 48034
Warren E. Avis	29200 Telegraph Road, Southfield, MI 48034
Jerry Bielfield Co.	8333 Michigan Avenue, Detroit, MI 48210
Jerry M. Bielfield	8333 Michigan Avenue, Detroit, MI 48210
Bob Ford, Inc.	14585 Michigan Avenue, Dearborn, MI 48126
John Ford	14585 Michigan Avenue, Dearborn, MI 48126
Jack Demmer Ford, Inc.	37300 Michigan Avenue, Wayne, MI 48184
John E. Demmer	37300 Michigan Avenue, Wayne, MI 48184
Richard Flannery	5900 Highland Road, Pontiac, MI 48054
Gorno Brothers, Inc.	22025 Allen Road, Woodhaven, MI 48183
Jerome-Duncan, Inc.	8000 Ford Country Lane, Sterling Heights, MI 48077
Richard J. Duncan	8000 Ford Country Lane, Sterling Heights, MI 48077
Al Long Ford, Inc.	13711 E. Eight Mile Road, Warren, MI 48089
McDonald Ford Sales, Inc.	550 W. Seven Mile Road, Northville, MI 48167
Pat Milliken Ford, Inc.	9600 Telegraph Road, Detroit, MI 48239
W.B. (Pat) Milliken	9600 Telegraph Road, Detroit, MI 48239

Respondents designated with "" are charged under both Count I and Count II of ths complaint. The other respondents are charged only under Count I.

Respondents designated with "" have had the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondents designated with "" have had Count II of the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondent name	Principal place of business
Russ Milne Ford, Inc.	43870 N. Gratiot Avenue, Mt. Clemens, MI 48043
Russell H. Milne	43870 N. Gratiot Avenue, Mt. Clemens, MI 48043
North Brothers Ford, Inc.	33300 Ford Road, Westland, MI 48185
James B. North	33300 Ford Road, Westland, MI 48185
Roy O'Brien, Inc.**	22201 E. Nine Mile Road, St. Clair Shores, MI 48080
Roy E. O'Brien**	22201 E. Nine Mile Road, St. Clair Shores, MI 48080
Ed Schmid Ford, Inc.	21600 Woodward Avenue, Ferndale, MI 48220
Edward F. Schmid	21600 Woodward Avenue, Ferndale, MI 48220
Stark Hickey West, Inc.	24760 W. Seven Mile Road, Detroit, MI 48219
William Hickey	24760 W. Seven Mile Road, Detroit, MI 48219
Bob Thibodeau, Inc.	26333 Van Dyke Avenue, Center Line, MI 48015
Robert Thibodeau	26333 Van Dyke Avenue, Center Line, MI 48015
Ray Whitfield Ford	10725 S. Telegraph Road, Taylor, MI 48180
Raymond J. Whitfield	10725 S. Telegraph Road, Taylor, MI 48180
Arnold Lincoln-Mercury Co.	29000 Gratiot Avenue, Roseville, MI 48066
Arnold Feuerman	29000 Gratiot Avenue, Roseville, MI 48066
Avon Lincoln-Mercury, Inc.	1185 S. Rochester Road, Rochester, MI 48063
Bob Borst Lincoln-Mercury, Inc.	1950 W. Maple Road, Troy, MI 48084
Robert C. Borst	1950 W. Maple Road, Troy, MI 48084
Crest Lincoln-Mercury Sales, Inc.	36200 Van Dyke Avenue, Sterling Heights, MI 48077
William Ritchie	36200 Van Dyke Avenue, Sterling Heights, MI 48077
Paul Meier**	36200 Van Dyke Avenue, Sterling Heights, MI 48077
Bob Dusseau, Inc.	31625 Grand River Avenue, Farmington, MI 48024
Robert Dusseau	31625 Grand River Avenue, Farmington, MI 48024
Stu Evans Lincoln-Mercury, Inc., of Garden City	32000 Ford Road, Garden City, MI 48135
Stu Evans Lincoln-Mercury, Inc., of Southgate	16800 Fort Street, Southgate, MI 48195
Stewart Evans	16800 Fort Street, Southgate, MI 48195
Hines Park Lincoln-Mercury, Inc.	40601 Ann Arbor Road, Plymouth, MI 48170

Respondents designated with "" are charged under both Count I and Count II of ths complaint. The other respondents are charged only under Count I.

Respondents designated with "" have had the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondents designated with "" have had Count II of the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondent name	Principal place of business
George Kolb	40601 Ann Arbor Road, Plymouth, MI 48170
Krug Lincoln-Mercury, Inc.	21531 Michigan Avenue, Dearborn, MI 48124
*Sigmund Krug***	21531 Michigan Avenue, Dearborn, MI 48124
Bob Maxey Lincoln-Mercury Sales, Inc.	16901 Mack Avenue, Detroit, MI 48224
Robert Maxey	16901 Mack Avenue, Detroit, MI 48224
Park Motor Sales Co.	18100 Woodward Avenue, Detroit, MI 48205
Star Lincoln-Mercury, Inc.	24350 W. Twelve Mile Road, Southfield, MI 48034
Stanley A. Wilk	24350 W. Twelve Mile Road, Southfield, MI 48034
Charnock Oldsmobile, Inc.	24555 Michigan Avenue, Dearborn, MI 48124
Dan Charnock**	24555 Michigan Avenue, Dearborn, MI 48124
J. Herbert Charnock	24555 Michigan Avenue, Dearborn, MI 48124
Al Dittrich	1155 Oakland Avenue, Pontiac, MI 48055
Drummy Oldsmobile, Inc.	14925 E. Eight Mile Road, East Detroit, MI 48021
John L. Drummy, Sr.	14925 E. Eight Mile Road, East Detroit, MI 48021
Gage Oldsmobile, Inc.	21710 Woodward Avenue, Ferndale, MI 48220
Bill Rowan Oldsmobile, Inc.	15800 Eureka Road, Southgate, MI 48195
William H. Rowan	15800 Eureka Road, Southgate, MI 48195
Roy D. Dodson**	15800 Eureka Road, Southgate, MI 48195
Suburban Oldsmobile-Datsun, Inc.	1810 Maplelawn, Troy, MI 48099
Autobahn Motors, Inc.	1765 S. Telegraph Road, Bloomfield Hills, MI 48013
Paul Carrick	1765 S. Telegraph Road, Bloomfield Hills, MI 48013
McAlister Motors, Inc.	44460 N. Gratiot Avenue, Mt. Clemens, MI 48043
W. Desmond McAlister	44460 N. Gratiot Avenue, Mt. Clemens, MI 48043
Melton Motors, Inc.	15100 Eureka Road, Southgate, MI 48195
George Melton	15100 Eureka Road, Southgate, MI 48195
Sterling Motors, Inc.	7500 E. Fifteen Mile Road, Sterling Heights, MI 48077
Robert Zankl	7500 E. Fifteen Mile Road, Sterling Heights, MI 48077
Wood Motors, Inc.	15351 Gratiot Avenue, Detroit, MI 48205
Donald Wood	15351 Gratiot Avenue, Detroit, MI 48205
LaFontaine Toyota**	22805 Michigan Avenue, Dearborn, MI 48124
Michael T. LaFontaine**	22805 Michigan Avenue, Dearborn, MI 48124
Page Toyota, Inc.**	21262 Telegraph Road, Southfield, MI 48075
Robert Page**	21262 Telegraph Road, Southfield, MI 48075
Al Foster**	1951 S. Telegraph, Bloomfield Hills, MI 48013
Edward Lewis**	2100 Fort Street, Condo 6, Trenton, MI 48183
Gerald Malooly**	17677 Mack Avenue, Detroit, MI 48224

Respondents designated with "" are charged under both Count I and Count II of ths complaint. The other respondents are charged only under Count I.

Respondents designated with "" have had the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondents designated with "" have had Count II of the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondent name	Principal place of business
Gerald Pollock**	16600 Fort Street, Southgate, MI 48195
Gerald Skokowski**	17677 Mack Avenue, Detroit, MI 48224
Theodore H. Solden**	40130 Steel Drive, Sterling Heights, MI 48078
William VanHecke**	50111 Van Dyke, Utica, MI 48087

PAR. 2. For the purposes of this complaint, the following definitions shall apply:

(a) *Dealer* is any natural person, corporate entity, partnership, association, joint venture, trust or any other organization or entity which receives on consignment or purchases motor vehicles for sale or lease to the public.

(b) *Detroit area* is the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State of Michigan.

(c) *And* and *or* have both conjunctive and disjunctive meanings.

PAR. 3. (a) Respondents, other than respondent associations and respondent James Daniel Hayes, are and have been dealers or dealer employees engaged in the business of selling or leasing motor vehicles from their places of business located in the Detroit area, including selling or leasing motor vehicles for transportation to other states, transporting motor vehicles to other states for sale or lease, receiving motor vehicles from other states, and selling or leasing motor vehicles financed by financial institutions located in other states and insured by insurance companies located in other states. At all relevant times hereto, in the course of their business, respondents, other than respondent associations and respondent James Daniel Hayes, and others in the Detroit area involved in the acts and practices described in this complaint have maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

(b) Respondent associations are member organizations whose memberships consist entirely, or almost entirely, of Detroit area dealers. At all relevant times hereto, as a result of the activities of respondent associations' dealer members, including the acts and practices described in this complaint, respondent associations and respondent James Daniel Hayes have engaged in activities which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondents designated with "" are charged under both Count I and Count II of ths complaint. The other respondents are charged only under Count I.

Respondents designated with "" have had the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

Respondents designated with "" have had Count II of the complaint dismissed against them by Commission order dated August 6, 1986 (unpublished).

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs 1, 2 and 3 are incorporated by reference herein as if fully set forth verbatim.

PAR. 4. Respondents are now engaging and have engaged, in agreement, contract, combination or conspiracy with each other and with other persons, in the following acts and practices, among others, as shown by minutes of dealer association meetings, newspaper advertisements (*see* Appendix A), and other evidence:

A. Adopting and adhering to a schedule limiting hours of operation for the sale or lease of motor vehicles in the Detroit area, including limiting weekday evening hours to Mondays and Thursdays and maintaining no hours on Saturdays, except for occasional special sales; and

B. Attempting to persuade and taking action to persuade dealers in the Detroit area to adopt or adhere to a schedule limiting hours of operation for the sale or lease of motor vehicles, including limiting weekday evening hours to Mondays and Thursdays and maintaining no hours on Saturdays.

PAR. 5. Respondents are now engaging and have engaged, in agreement, contract, combination or conspiracy with each other and with other persons, in various acts or practices in furtherance of the acts and practices referred to in Paragraph 4, including among other things:

A. Threatening physical harm to owners, officers and employees, and families of owners, officers and employees, of dealers in the Detroit area that attempt to sell or lease motor vehicles on Saturdays or on weekday evenings other than Mondays and Thursdays;

B. Threatening to damage and damaging the property of dealers in the Detroit area that attempt to sell or lease motor vehicles on Saturdays or on weekday evenings other than Mondays and Thursdays; and

C. Obstructing or interfering with the lawful business of dealers in the Detroit area that attempt to sell or lease motor vehicles on Saturdays or on weekday evenings other than Mondays and Thursdays.

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs 1, 2 and 3 are incorporated by reference herein as if fully set forth verbatim, except that the allegations of this Count II are made only against respondents denoted with an "*" in the caption and Paragraph 1 hereof.

PAR. 6. Respondents are now engaging and have engaged, in agree-

ment, contract, combination or conspiracy with each other and with other persons, in one or both of the following acts and practices, among others:

A. Restricting the advertising of motor vehicles in the classified section of newspapers in the Detroit area; and

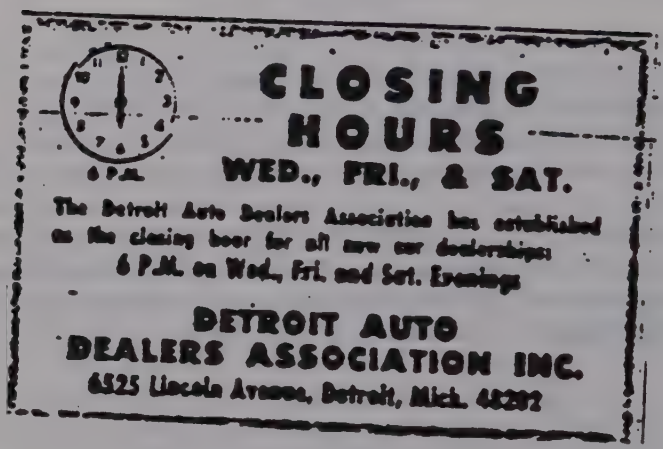
B. Restricting the advertising or publishing of the prices of motor vehicles in the Detroit area.

Violations Charged

PAR. 7. The acts and practices alleged herein have had and are now having the purpose and effect of foreclosing, reducing and restraining competition among dealers in the Detroit area in the sale or lease of motor vehicles, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The unfair methods of competition and unfair acts and practices of respondents, as alleged herein, are continuing and will continue in the absence of the relief herein requested.

APPENDIX A

DETROIT NEWS
7/7/65, p. 11D


CLOSING
HOURS
WED., FRI., & SAT.
6 P.M.
The Detroit Auto Dealers Association has established as the closing hour for all new car dealerships: 6 P.M. on Wed., Fri. and Sat. Evenings
DETROIT AUTO
DEALERS ASSOCIATION INC.
6525 Lincoln Avenue, Detroit, Mich. 48202

DETROIT NEWS
6/12/69, p. 17C

PUBLIC NOTICE

A RECENT SURVEY AMONG INDIVIDUAL CHRYSLER-PLYMOUTH DEALERS REVEALS

A MAJORITY OF THE CHRYSLER-PLYMOUTH DEALERS IN THE GREATER DETROIT AREA

PLAN TO CLOSE SATURDAYS DURING THE SUMMER MONTHS, TO ALLOW THEIR SALESMEN MORE TIME WITH THEIR FAMILIES.

BUT WILL BE OPEN

Monday & Thursday Evenings For Your Convenience UNTIL 9 P.M.

TUESDAY, WEDNESDAY & FRIDAY UNTIL 6 p.m.

AN EFFORT TO REMAIN ABREAST OF THE TIMES, WITHOUT SACRIFICE TO CUSTOMER ACCOMMODATION AND SERVICE.

Albro Chrysler-Plymouth, Inc.
Bellie Barrett Chrysler-Plymouth, Inc.
Birmingham Chrysler-Plymouth Co.
Ken Brown, Inc.
Bill Cochrane, Inc.
Colony Chrysler-Plymouth, Inc.
Damaron Motor Sales, Inc.
Ed Davis, Inc.
Downriver Chrysler-Plymouth, Inc.
Felster Auto Sales, Inc.
Dick Greene Chrysler-Plymouth, Inc.
Jim Grissom Chrysler-Plymouth, Inc.
Grosse Pointe Chrysler-Plymouth, Inc.
Johnny Motor Sales, Inc.
Lepper-Goethe, Inc.
Lochmoor Chrysler-Plymouth, Inc.
Mason Chrysler-Plymouth, Inc.
Monicatti Chrysler-Plymouth Sales, Inc.
Northland Chrysler-Plymouth, Inc.
Oakland Chrysler-Plymouth, Inc.
B. J. Ratigan Chrysler-Plymouth, Inc.
Raynal Plymouth Co.
Redford Sales & Service
Roseville Chrysler-Plymouth, Inc.
Schultz Motors, Inc.
Bill Southkamp, Inc.
Thompson Chrysler-Plymouth, Inc.
Town & Country Chrysler-Plymouth, Inc.
Westhorn Chrysler-Plymouth, Inc.

DETROIT NEWS
6/13/69, p. 18C

Effective Saturday, May 31st

PONTIAC DEALERS

OF

The Greater Detroit Area

Will Close Saturdays

For The Summer Months

Allowing Our Salesmen The Needed

Time With Their Families.

We Will Be Open

Monday & Thursday Till 9 P.M.

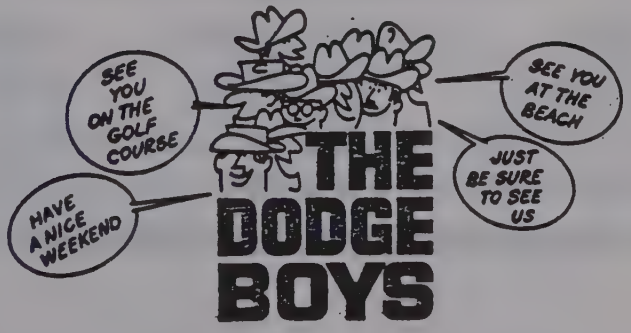
Tuesday, Wednesday & Friday Till 6 P.M.

ABBETTE PONTIAC, INC. Troy, Mich.	CLOBECY PONTIAC, INC. Detroit, Mich.	WOODY PONTIAC SALES Warren, Mich.	ACE WILSON'S ROYAL PONTIAC Royal Oak, Mich.
JIM CAUSLEY PONTIAC, INC. Detroit, Mich.	DUDGE CRAIG PONTIAC Plymouth, Mich.	HIGGINS PONTIAC CO. Ferndale, Mich.	BOB SHELTON PONTIAC-BUICK Rochester, Mich.
RED DOLMAN PONTIAC CO. Westland, Mich.	GLENN PONTIAC, INC. Detroit, Mich.	RINKE PONTIAC CO. Warren, Mich.	SIMPSON PONTIAC SALES, INC. Southgate, Mich.
BARNETT PONTIAC, INC. Dearborn, Mich.	PACKER PONTIAC CO. Detroit, Mich.	RANDY WOOD PONTIAC Mt. Clemens, Mich.	CHARLIE DORKE PONTIAC, INC. Detroit, Mich.

DETROIT NEWS
6/13/69, p. 17C

By popular demand, Saturday has been moved to Monday, Tuesday, and Thursday evenings at most of the Dodge Boys.'

Both our customers and employees say they'd rather see us open evenings than on Saturday. Being Good Guys, we're glad to accommodate them. From now on, practically all of the Detroit Area Dodge Boys' will be open Monday, Tuesday, and Thursday evenings until 9:00 and will be closed all day Saturday. (Check with your Dodge Dealer to be sure.)



ANOTHER PUBLIC SERVICE FROM

The Detroit Area Dodge Boys.

—See Dodge and the big-name stock car drivers in action this Sunday at the "Motor State 500"—Michigan International Speedway, Jackson, Michigan.

DETROIT NEWS
6/17/69, p. 15C

ATTENTION OLDSMOBILE BUYERS

EFFECTIVE JUNE 21st THE FOLLOWING OLDSMOBILE DEALERS WILL BE CLOSED SATURDAYS UNTIL SEPTEMBER 6th

New Weekday Sale Hours Will Be As Follows:

MONDAY 9 A.M. TO 9 P.M. WEDNESDAY 9 A.M. TO 6 P.M.
TUESDAY 9 A.M. TO 9 P.M. THURSDAY 9 A.M. TO 9 P.M.
FRIDAY 9 A.M. TO 6 P.M.

WE THANK YOU FOR YOUR PATRONAGE

GAGE OLDSMOBILE	SUPERIOR OLDSMOBILE	ROSEDALE MOTORS INC.
21710 Woodward	15000 W. 7 Mile Rd.	17411 Grand River
399-3200	342-7000	VE 5-4600

A-5

DETROIT FREE PRESS
6/19/69, p. 13D

PUBLIC NOTICE

YOUR METROPOLITAN DETROIT

BUICK

DEALERS WISH TO ADVISE
YOU OF THEIR

NEW SUMMER HOURS

WE WILL BE OPEN
MONDAY-TUESDAY AND THURSDAY
UNTIL 9 P.M.

WEDNESDAY AND FRIDAY
UNTIL 6 P.M.

WE WILL BE CLOSED
ALL DAY SATURDAY AND SUNDAY

**DETROIT METROPOLITAN
BUICK DEALERS ASSOC.**

DETROIT FREE PRESS
6/5/70, p. 10C

NOTICE

CHRYSLER-PLYMOUTH DEALERS
OF GREATER DETROIT ANNOUNCE

They will be closed SATURDAYS during JUNE, JULY & AUGUST, to allow their employees more time with their families,

BUT WILL BE OPEN
Monday & Thurs. Evenings 'til 9 P.M.
Tues., Wed & Fri. 'til 6 P.M.
FOR YOUR CONVENIENCE

DETROIT FREE PRESS
6/25/70, p. 9B

Public Notice

SO OUR EMPLOYES CAN SPEND MORE
TIME WITH THEIR FAMILIES DURING THE SUMMER . . .

PONTIAC DEALERS WILL BE CLOSED SATURDAYS

EFFECTIVE JULY 4th

OUR SUMMER HOURS ARE:

MONDAYS AND THURSDAYS 'TIL 9 P.M.

TUES., WEDS. & FRIDAYS 'TIL 6 P.M.

thru July and August

ARBETTE PONTIAC, INC. Troy, Mich.
BLOMECT PONTIAC, INC. Dearborn, Mich.
BIGGIES PONTIAC CO. Ferndale, Mich.
ACE WILSON'S ROYAL PONTIAC Royal Oak, Mich.
JIM CAMELEY PONTIAC, INC. Detroit, Mich.
BRUCE CRAIG PONTIAC Plymouth, Mich.
BOB SKELTON PONTIAC-BUICK Rochester, Mich.
BOB HOLIDAY PONTIAC CO. Westland, Mich.
FISCHER PONTIAC, INC. Detroit, Mich.
GIBBLE PONTIAC CO. Warren, Mich.
SIMPSON PONTIAC SALES, INC. Southgate, Mich.
GARRETT PONTIAC, INC. Dearborn, Mich.
WOODY PONTIAC SALES Hamtramck, Mich.
HARRY WOOD PONTIAC Mt. Clemens, Mich.
PONTIAC RETAIL STORE Pontiac, Mich.

DETROIT NEWS
6/28/70, p. 15C

NEVER ON SATURDAY

(DURING JULY AND AUGUST)

We'd like to remind you that The Chevrolet Dealers of Greater Detroit will be closed on Saturday during the months of July and August. *But all of us will be open until 9:00 every Monday and Thursday throughout the summer.* Come on up and see us sometime.

THE METROPOLITAN DETROIT CHEVROLET DEALERS

A-9

DETROIT NEWS
5/14/71, P. 12C

ATTENTION, ALL WEEKEND CAR SHOPPERS!

THERE ARE JUST

2

SATURDAYS LEFT TO SHOP FOR A

DODGE DEAL

The Good Guys (your Dodge Dealers) want their sales people, office staffs and parts-service specialists to enjoy weekends with their families all summer long. That's why most Detroit-area Dodge Dealers will be CLOSED SATURDAYS during June, July and August. But, they'll be open MONDAY thru FRIDAY eager to please you in every way!

Colonial Dodge
Crestwood Dodge
Eastowne Dodge
Garrity Motor Sales
Fernwood Dodge
Hunter Dodge
Husak Brothers
McMan Dodge
Motor City Dodge

Mount Clemens Dodge
Northwestern Dodge
Pointe Dodge
Raynal Brothers
South Pointe Dodge
Sterling Heights Dodge
Town & Country Dodge
Van Dyke Dodge
Jim Vince Dodge
Tel-Twelve Dodge

A-10

DETROIT FREE PRESS
5/22/71, p. 11B

PUBLIC NOTICE

SO THAT ALL OF OUR SALES PERSONNEL MAY ENJOY THE SUMMER WEEKENDS WITH THEIR FAMILIES, THE

CHRYSLER-PLYMOUTH DEALERS

OF THE GREATER DETROIT AREA

WILL CLOSE SATURDAYS DURING THE SUMMER COMMENCING MAY 29, 1971

FOR YOUR CONVENIENCE WE WILL BE OPEN
MONDAY & THURSDAY EVENINGS 'TIL 9 PM
TUESDAY, WEDNESDAY & FRIDAY EVENINGS 'TIL 6 PM

THIS ADDITIONAL LEISURE TIME IS VOLUNTARILY DONATED BY YOUR PUBLIC SPIRITED CHRYSLER-PLYMOUTH DEALERS IN AN EFFORT TO PROMOTE BETTER EMPLOYEE & COMMUNITY RELATIONS

A-11

DETROIT FREE PRESS
5/24/71, p. 10C

NEVER ON SATURDAY

DURING JUNE, JULY AND AUGUST

All Chevrolet Dealers of Greater Detroit will be closed Saturdays during the months of June, July and August, so our salesmen can enjoy the summer. Which means we'll all be in better spirits to make good Chevy deals throughout the rest of the week . . . and Monday and Thursday evenings until 9:00. See you then. And we hope you'll enjoy your Saturdays as much as we will.

THE METROPOLITAN DETROIT CHEVROLET DEALERS

DETROIT FREE PRESS
5/27/71, p. 12B

Public Notice

SO OUR EMPLOYES CAN SPEND MORE TIME WITH THEIR FAMILIES DURING THE SUMMER . . .

PONTIAC DEALERS WILL BE CLOSED SATURDAY

EFFECTIVE MAY 29th

OUR SUMMER HOURS ARE:

MONDAYS AND THURS. 'TIL 9 P.M.

TUES., WEDS. & FRI. 'TIL 6 P.M.

UNTIL SEPTEMBER

AUBETTE PONTIAC, INC. Troy, Mich.	BRUCE CRAIG PONTIAC Plymouth, Mich.	BINKE PONTIAC CO. Warren, Mich.	PORTERFIELD WILSON PONT. Detroit, Mich.
BARNETT PONTIAC INC Dearborn Mich	BIGGINS PONTIAC CO Ferndale, Mich	BUD SHELTON PONTIAC BUICK Rochester, Mich.	RANDY WOOD PONTIAC Mt. Clemens, Mich.
[illegible] CAUSLEY PONTIAC INC Detroit Mich	RED HOLMAN PONTIAC CO Westland Mich	Simpson Pontiac Sales Inc Southgate, Mich	WOODY PONTIAC SALES Hamtramck, Mich
[illegible] PONTIAC INC [illegible] Mich	PACKER PONTIAC CO Detroit Mich	Are Wilson's Royal Pontiac Royal Oak Mich	

DETROIT FREE PRESS
5/27/71, p. 10B

FORD DEALERS ANNOUNCE...
new showroom hours
The majority of the Detroit Metropolitan Ford Dealers will be closed on Saturdays, effective May 29 and continuing through September 4, but will be open until 9:00 p.m. Mondays and Thursdays throughout the summer.
METROPOLITAN DETROIT FORD DEALERS
DAD

DETROIT FREE PRESS
5/28/71, p. 2B

We're buggin' out on Saturdays.

Starting tomorrow, we'll be closed every Saturday 'til Labor Day so we can enjoy more of the summer season with our families. In the meantime, our Sales and Service facilities will be open Monday thru Friday as usual.

Why don't you bug out, too. Come on in and see us . . . except Saturdays.

SUBURBAN VOLKSWAGEN, INC.
[illegible] Washtenaw Avenue
Ypsilanti

MELTON MOTORS, INC.
15100 Eureka
Southgate

McALISTER MOTORS, INC.
[illegible] Norm Gratiot
[illegible]

GREENE MOTORS, INC.
[illegible]

FALVEY AUTOS, INC.

BILL GOLLING VOLKSWAGEN, INC.
1821 Maplelawn Boulevard
Troy

AUTOBAHN MOTORS, INC.
1765 South Telegraph Road
Pontiac

HOWARD COOPER VOLKSWAGEN, INC.
[illegible] South State Street
Ann Arbor

WOOD MOTORS, INC.
[illegible] Gratiot Avenue
[illegible]

BUD CLARK, INC.
[illegible] Avenue

BOB ZANKL VOLKSWAGEN, INC.
15 Mile and Van Dyke
Sterling Heights

SEAWAY MOTORS, INC.
6375 West Fort Street
Detroit

DETROIT FREE PRESS
5/23/72, p. 9B

NEVER ON SATURDAY

BEGINNING MAY 27, THROUGH AUGUST

We'd like to remind you that The Chevrolet Dealers of Greater Detroit will be closed on Saturday beginning May 27, through August. *But all of us will be open until 9:00 every Monday and Thursday throughout the summer.* Come on up and see us sometime.

THE METROPOLITAN DETROIT CHEVROLET DEALERS

A-16

DETROIT NEWS
5/24/72, p. 21C

DETROIT FREE PRESS
5/25/72, p. 17C

Public Notice

SO OUR EMPLOYES CAN SPEND MORE
TIME WITH THEIR FAMILIES DURING THE SUMMER . . .

PONTIAC DEALERS WILL BE CLOSED SATURDAYS

EFFECTIVE MAY 27TH

OUR SUMMER HOURS ARE:

MONDAYS AND THURSDAYS 'TIL 9 P.M.
TUES., WEDS. & FRIDAYS 'TIL 6 P.M.
UNTIL SEPTEMBER

ANNETTE PONTIAC, INC.
Troy, Mich.

BARRETT PONTIAC, INC.
Dearborn Mich.

BELCASTRO PONTIAC, INC.
Ferndale, Mich.

JIM CAUSLEY PONTIAC, INC.
Sterling, Mich.

BRUCE CRAIG PONTIAC
Plymouth, Mich.

BEN HOLMAN PONTIAC CO.
Westland, Mich.

McMULLEN PONTIAC, INC.
Pontiac, Mich.

PACKER PONTIAC CO.
Detroit, Mich.

DINKE PONTIAC CO.
Warren, Mich.

DON SELLERS PONTIAC, INC.
Detroit, Mich.

DON SHELTON PONTIAC-BUICK
Rochester, Mich.

SIMPSON PONTIAC SALES INC.
Southgate, Mich.

ACE WILSON ROYAL PONTIAC
Royal Oak, Mich.

PONTERFIELD WILSON PONTIAC
Detroit, Mich.

RANDY WOOD PONTIAC
Mt. Clemens, Mich.

WOODY PONTIAC SALES
Hamtramck, Mich.

PONTIAC RETAIL STORE
Pontiac, Mich.

DETROIT FREE PRESS
5/26/72, p. 10C

Closed Saturdays for the summer at the sign of the cat!

Effective immediately, all Detroit area Lincoln-Mercury dealers will be closed Saturdays to give employees full weekends with their families. Your understanding in visiting Monday thru Friday (including Monday and Thursday nights 'til 9 o'clock) is appreciated.

A-19

DETROIT FREE PRESS
5/26/72, p. 11C

Detroit Area Oldsmobile Dealers Will Be Closed Saturday and Memorial Day.

NEW SUMMER HOURS:

Mondays and Thursdays, Open 'Til 8 P.M.
Tuesdays, Wednesdays and Fridays,
Open 'Til 6 P.M. — Closed Saturdays

Chernock Oldsmobile
24555 Michigan Avenue, Dearborn, 565-6500

Drummy Oldsmobile
14925 E. 8 Mile Road, East Detroit, 772-2200

Edmond Motor Sales
12101 Joseph Campau, Hamtramck, 365-5500

Gage Oldsmobile
21710 Woodward Avenue, Ferndale, 399-3200

Glassman Oldsmobile
28000 Telegraph Road, Southfield, 354-3300

Hargreve Oldsmobile
33073 Michigan Avenue, Wayne, 721-3630

Key Oldsmobile
2446 E. 12 Mile Road, Warren, 751-6100

Bill Lee Oldsmobile
295 South Gratiot, Mt. Clemens, 465-0456

Rosedale Motors
17411 Grand River, Detroit, 272-6212

Bill Rowen Oldsmobile
15800 Eureka, Southgate, 282-3100

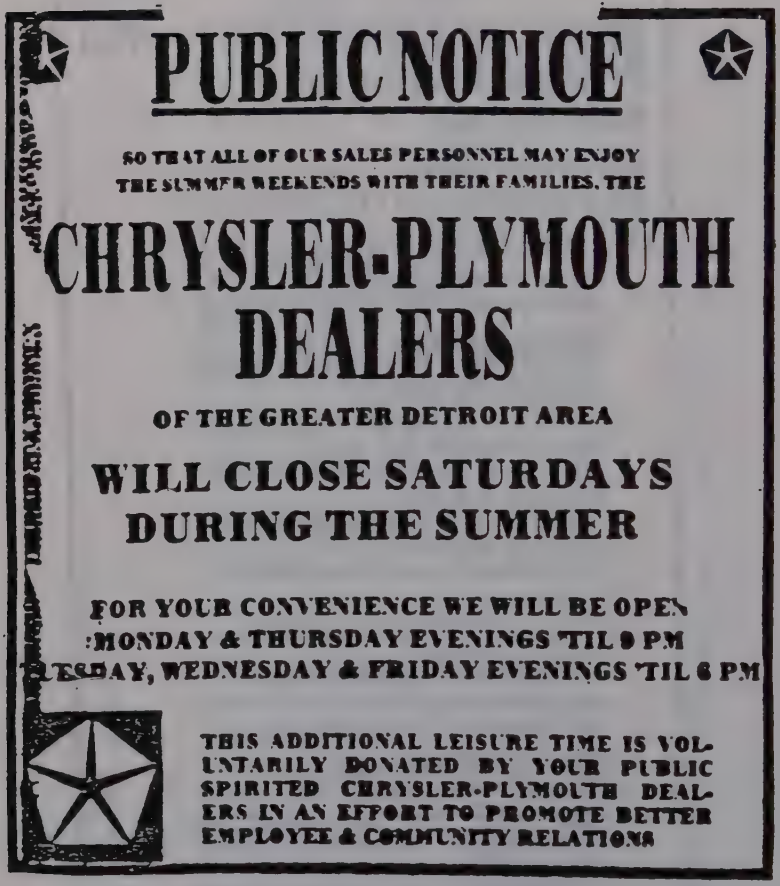
Bob Saks Oldsmobile
15205 E. Jefferson, Grosse Pointe Park, 821-5000

Suburban Motors Company
565 S. Woodward Avenue, Birmingham, 644-4440

Superior Oldsmobile
15000 W. 7 Mile Road, Detroit, 342-7000

Detroit Oldsmobile Dealers Association

DETROIT NEWS
6/1/72, p. 15D


PUBLIC NOTICE
SO THAT ALL OF OUR SALES PERSONNEL MAY ENJOY
THE SUMMER WEEKENDS WITH THEIR FAMILIES, THE
CHRYSLER-PLYMOUTH
DEALERS
OF THE GREATER DETROIT AREA
WILL CLOSE SATURDAYS
DURING THE SUMMER
FOR YOUR CONVENIENCE WE WILL BE OPEN
MONDAY & THURSDAY EVENINGS 'TIL 9 P.M.
TUESDAY, WEDNESDAY & FRIDAY EVENINGS 'TIL 6 P.M.
THIS ADDITIONAL LEISURE TIME IS VOL-
UNTARILY DONATED BY YOUR PUBLIC
SPIRITED CHRYSLER-PLYMOUTH DEAL-
ERS IN AN EFFORT TO PROMOTE BETTER
EMPLOYEE & COMMUNITY RELATIONS

A-21

Detroit Free Press
5/24/73, p. 17c

PUBLIC NOTICE

CHRYSLER PLYMOUTH DEALERS
OF GREATER DETROIT
WILL BE

CLOSED SATURDAYS
MAY 26th THRU SEPT. 1st

OPEN MONDAYS & THURSDAYS TIL 9 P.M.
TUESDAY, WEDNESDAY, FRIDAY TIL 6 P.M.

Detroit Free Press
5/26/73, p. 10c

Closed
Saturdays
for the Summer
at the sign
of the cat!
Effective immediately and through August, all Detroit area Lincoln-Mercury dealers will be closed Saturdays to give employees full weekends with their families. Your understanding in visiting Monday thru Friday (including Monday and Thursday nights until 9 o'clock) is appreciated.
MERCURY
LINCOLN
LMDA

Detroit Free Press
5/30/73, p. 12c

GREATER DETROIT CHEVROLET DEALERS

ANNOUNCES NEW SUMMER HOURS

For the convenience of our employees and their families, the Greater Detroit Chevrolet Dealers, will be closed on Saturdays, during the months of June, July, and August.

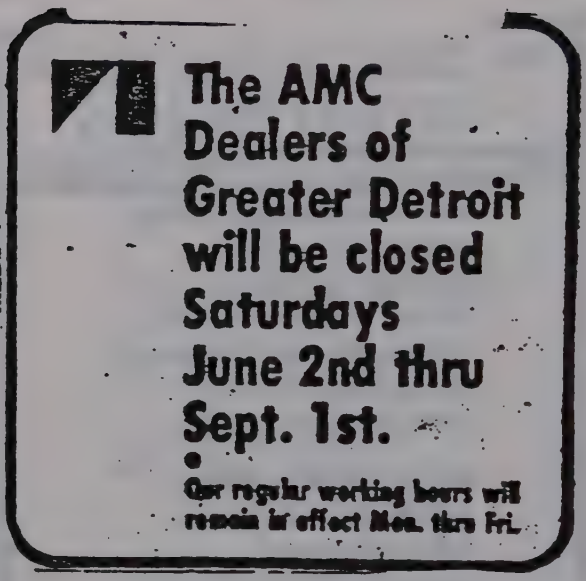
Our Sales Department will be open during the following hours

MONDAY AND THURSDAY
8:30 A.M. TO 9:00 P.M.

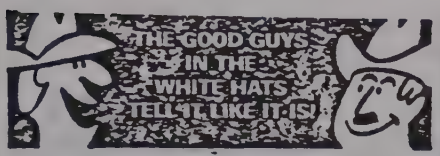
TUESDAY, WEDNESDAY AND FRIDAY
8:30 A.M. to 6 P.M.

"HAVE A SAFE AND HAPPY SUMMER"

Detroit News
5/30/73, p. 21C



Detroit Free Press
6/2/73, p. 9c



NOW—THRU SEPT 10th
DETROIT AREA
DODGE DEALERS
WILL BE
CLOSED SATURDAYS
DURING
JUNE, JULY & AUG.

In order to give our sales and service guys 'n gals their full share of summer weekend fun, we will close our Dodge Dealerships on Saturdays beginning June 2.

We'll stay open 'til 9 p.m.
Mondays & Thursdays

So that you'll have plenty of convenient shopping time—plus time to bring your car in for dependable Good Guys' service, most of us will stay open until 9:00 PM Monday and Thursday evenings during June, July, and August. Take Advantage of our convenient evening hours.

DRIVE CAREFULLY
ENJOY YOUR WEEKEND

THE DODGE BOYS

DEPEND ON THE
DETROIT AREA
GOOD GUYS

DETROIT FREE PRESS
11/28/73, p. 14B

THE DODGE BOYS
OUR SHOWROOMS WILL BE CLOSED SATURDAYS, STARTING DECEMBER 1ST
We Detroit Area Good Guys
are doing our bit to ease the energy crisis.
One less day of heating, lights, our people driving to and from their jobs—it'll all add up to help ease the crunch. And if everyone will just add his "little bit" to help ease the shortage, we'll all make it through these tight times.
Naturally, we'll be open Mondays through Fridays, as usual—and many of our showrooms will be open Monday and Thursday evenings for your convenience.
We're doing our bit, and we're depending on your help, too!
ED CARPENTER SALES 33640 Michigan Ave. Wayne, Mich. 48184
Jack Henderson Dodge, Inc. 9700 Belleville Rd. Belleville, Mich. 48111
Northwestern Dodge, Inc. 10500 W. Eight Mile Ferndale, Mich. 48237
Sterling Heights Dodge, Inc. 40111 Van Dyke Sterling Hgts., Mich. 48087
COLONIAL DODGE, INC. 24211 Gratiot Ave East Detroit Mich. 48701
HUSAK BROTHERS, INC. 8421 Michigan Ave Detroit, Mich 48210
OAKLAND DODGE, INC. 101 W. 14 Mile Rd. Madison Hgts., Mich 48071
Tel-Twelve Dodge, Inc. 24625 W. 12 Mile Southfield, Mich. 48075
CRESTWOOD DODGE, INC. 32850 Ford Rd Garden City Mich 48135
G. E. Miller Sales & Service 127 Hutton St. Northville Mich 48167
POINTE DODGE, INC. 18001 Mack Ave. Detroit, Mich 48224
Town & Country Dodge, Inc. 31015 Grand River Farmington, Mich 48024
FERNWOOD DODGE, INC. 23000 Woodward Ave Ferndale Mich 48220
Motor City Dodge, Inc. 855 Oakland Pontiac, Mich 48055
Royal Brothers Company 9103 Chalmers Detroit, Mich 48213
VAN DYKE DODGE, INC. 28400 Van Dyke Warren Mich 48093
Garrity Motor Sales, Inc 11500 Joseph Campau Hamtramck Mich 48212
Mt. Clemens Dodge, Inc. 43774 N. Gratiot Ave Mt. Clemens Mich 48043
SOUTH POINTE DODGE 13500 Telegraph Taylor, Mich 48180
JIM VINCE DODGE, INC. 2319 Fort St Wyandotte, Mich 48192

A-27

Detroit News
11/29/73, p. 22 C

SPECIAL ANNOUNCEMENT

YOUR TRI-COUNTY PONTIAC DEALERS WILL NOW BE CLOSED ON SATURDAYS

No one knows how long the energy crisis will last, but we all want to do our part to help. So, the 22 Tri-County Pontiac Dealers have decided to close their showrooms every Saturday, beginning December 1st. This means we'll be decreasing our power consumption by approximately 15%.

Detroit News
11/29/73 p. 12 C

TRI-COUNTY PONTIAC DEALERS ASSOCIATION

AUDETTE PONTIAC, INC.
[illegible] Mapis Road
Troy, Michigan [illegible]
[illegible]

BARNETT PONTIAC, INC.
14505 Michigan Avenue
Dearborn, Michigan 48126
[illegible]

JIM FRESARD PONTIAC, INC.
[illegible] North Main
Royal Oak, Michigan [illegible]
[illegible]

SHELTON PONTIAC-BUICK, INC.
[illegible] S. Rochester Road
Rochester, Michigan [illegible]
[illegible]

BELCASTRO PONTIAC, INC.
[illegible] Woodward
Ferndale, Michigan [illegible]
[illegible]

We pledge to use less energy today, so that everyone can have more tomorrow.

SIMPSON PONTIAC SALES, INC.
[illegible] Fort Street
Southgate, Michigan [illegible]
[illegible]

JIM CAUSLEY PONTIAC, INC.
17677 Mack Avenue
Detroit, Michigan 48224
[illegible]

ART MORAN PONTIAC, INC.
[illegible] Telegraph
Southfield, Mich. [illegible]
[illegible]

PACKER PONTIAC COMPANY
[illegible] Livernois
Detroit, Michigan [illegible]
[illegible]

SKINNER-FRUIN AUTO SALES, INC.
[illegible] S. Main Street
Richmond, Michigan [illegible]
[illegible]

BRUCE CRAIG PONTIAC, INC.
[illegible] W. Ann Arbor Road
Plymouth, Michigan [illegible]
[illegible]

RUSS JOHNSON SALES, INC.
[illegible] N. Lapeer Rd.
Lake Orion, Michigan [illegible]
[illegible]

PONTIAC RETAIL STORE
[illegible] University Drive
Pontiac, Michigan [illegible]
[illegible]

PORTERFIELD WILSON PONTIAC, INC.
[illegible] Grand River Avenue
Detroit, Michigan 48227
[illegible]

JACK W. HAUPT SALES, INC.
[illegible] N. Main Street
Clarkston, Michigan [illegible]
[illegible]

McMULLEN PONTIAC, INC.
[illegible] Elizabeth Lake Road
Pontiac, Michigan [illegible]
[illegible]

RINKE PONTIAC CO.
[illegible] Van Dyke
Warren, Michigan [illegible]
[illegible]

RANDY WOOD PONTIAC, INC.
[illegible] Gratiot Avenue
Mount Clemens, Michigan [illegible]
[illegible]

RED HOLMAN PONTIAC CO.
[illegible] Ford Road
Westland, Michigan [illegible]

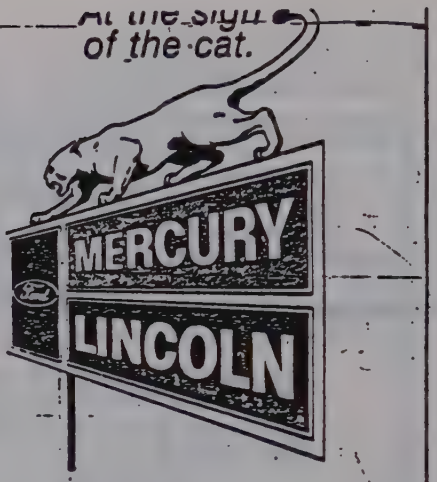
KELLY MINNICK, INC.
[illegible] Auburn
Utica, Michigan [illegible]

BOB SELLERS PONTIAC, INC.
[illegible] Grand River Avenue
Detroit, Michigan [illegible]
[illegible]

WOODY PONTIAC SALES, INC.
[illegible] Jos. Campau
Detroit, Michigan [illegible]
[illegible]

Detroit News, 11/29/73, p. 22C

DETROIT FREE PRESS
11/29/73, p. 14C



We're closed on Saturdays.

Because we wish to afford our sales personnel as much time to enjoy family life as other working people, we've decided to close our showrooms on Saturdays. Our service departments have not been open on Saturdays for quite a while.

Also, the energy crisis is persuading many businesses to curtail their operating hours. Not only is there a real need to conserve energy, but, frankly, the higher cost of utilities has been an incentive to reduce overhead.

We believe our change in hours will not inconvenience our customers. In fact, we're sure we can better accommodate you by keeping our showrooms open until 9 p.m. on Monday and Thursday nights. We're looking forward to seeing you then, at the sign of the cat.

Visit your Detroit area
Lincoln-Mercury Dealer.

Open Monday and Thursday till 9 p.m.
for your shopping convenience.

DEALER LMDA ADVERTISING

A-31

Now Detroit Metropolitan Ford Dealers will be closed On Saturdays

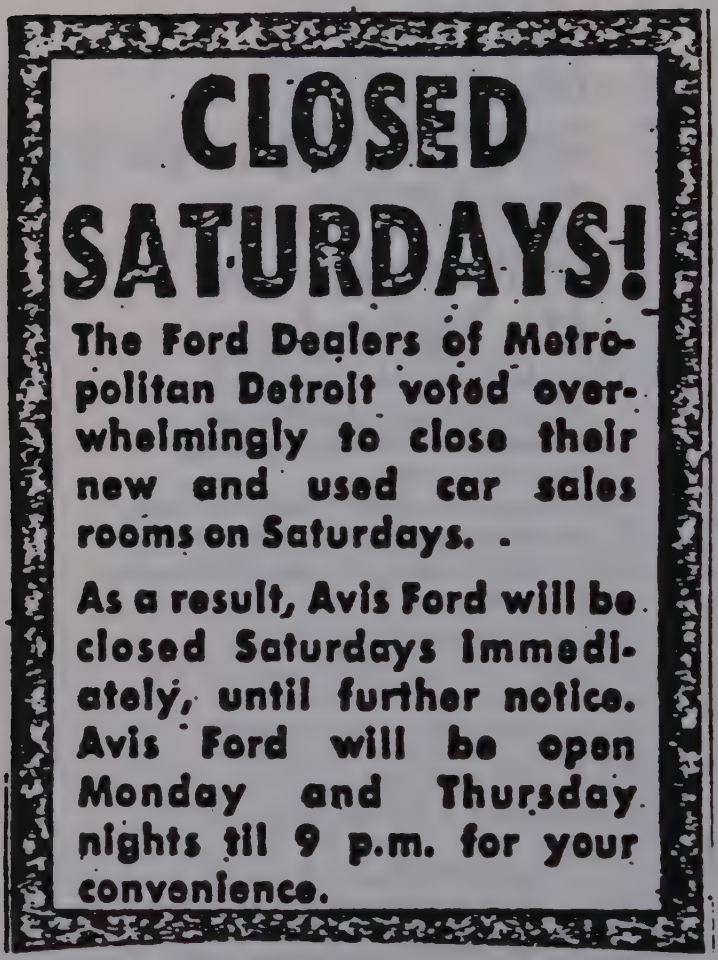
Until further notice participating Detroit Metropolitan Ford Dealers will be closed Saturday beginning December 1, 1973.

For your convenience we will be open until 9:00 P.M. Monday and Thursday, and until 6:00 P.M. Tuesday, Wednesday and Friday.

Detroit Metropolitan Ford

Detroit Free Press 11/30/73 P. 2D

Detroit News
12/9/73, p. 22 C


CLOSED
SATURDAYS!
The Ford Dealers of Metropolitan Detroit voted overwhelmingly to close their new and used car sales rooms on Saturdays.
As a result, Avis Ford will be closed Saturdays immediately, until further notice. Avis Ford will be open Monday and Thursday nights til 9 p.m. for your convenience.

A-33

Decision and Order

The Commission having heretofore issued its two count complaint charging the respondents named in the complaint issued in this matter on December 20, 1984, with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The Chevrolet association, the Chevrolet dealers, and the Chevrolet individual respondents identified in Attachments A, B and C to this order, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order for Count II of the complaint, an admission by the identified respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in Count II of such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn Count II of the complaint from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Chevrolet dealers identified in Attachment A are all corporations with their principal places of business located at the addresses shown in Attachment A.

2. Individual respondents identified in Attachment B are officers of various Chevrolet dealers, as shown in Attachment B, and as such they formulate, direct and control the acts and practices of the dealers for which they are officers.

3. The respondent Chevrolet association identified in Attachment C is an incorporated trade association for Chevrolet motor vehicle dealers with its principal place of business located at the address shown in Attachment C.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as it relates to Count II of the complaint and of the respondents listed in Attachments A, B and C, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions shall apply:

1. *Person* means any natural person, corporation, partnership, association, joint venture, trust or any other organization or entity, but not governmental entities.

2. *Dealer* means any person who receives on consignment, or purchases, motor vehicles for sale or lease to the public, and any director, officer, employee, representative or agent of any such person.

3. *Other dealer* means any dealer not named in this order.

4. *Dealer association* means any trade, civic, service, or social association whose membership is comprised primarily of dealers.

5. *Detroit area* means the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State of Michigan.

6. *Respondent* means any corporation listed in Attachment A, any individual listed in Attachment B, or any association listed in Attachment C, and the officers, directors, representatives, agents, divisions, subsidiaries, and successors and assigns of any listed corporation or association.

I.

It is ordered, That each respondent shall cease and desist from, directly or indirectly, or through any corporate or other device, entering into or continuing or carrying out any agreement, contract, combination or conspiracy with any respondent or any other dealer or dealer association in the Detroit area which has the purpose or effect of:

A. Restricting, regulating or limiting the advertising of any motor vehicle in the classified section of any newspaper or the advertising or publishing by any person of any price, term, or condition of sale of any motor vehicle, except to the extent that the restriction, regulation or limitation of such advertising is necessary for the purpose of engaging in lawful joint advertising; or

B. Maintaining, adopting or adhering to any policy, act or practice that restricts, regulates or limits the advertising by any person of any motor vehicle in the classified section of any newspaper or the advertising or publishing by any person of any price, term, or condition of sale of any motor vehicle, except to the extent that the restriction, regulation or limitation of such advertising is necessary for the purpose of engaging in lawful joint advertising.

II.

It is further ordered, That each respondent shall cease and desist from, directly or indirectly, or through any corporate or other device, performing any of the following acts or practices, or encouraging any person to perform any of the following acts or practices, or entering into or continuing or carrying out any agreement, contract, combination or conspiracy with any other person in the Detroit area to do or perform any of the following acts or practices:

A. Requesting, recommending, coercing, influencing, encouraging or persuading, or attempting to request, recommend, coerce, influence, encourage or persuade, any other respondent or any other dealer in the Detroit area to maintain, adopt or adhere to any policy, act or practice that restricts, regulates or limits the advertising by any person of any motor vehicle in the classified section of any newspaper or the advertising or publishing by any person of any price, term, or condition of sale of any motor vehicle, except to the extent that the restriction, regulation or limitation of such advertising is necessary for the purpose of engaging in lawful joint advertising; or

B. Requesting, recommending, coercing, influencing, encouraging or persuading, or attempting to request, recommend, coerce, influence, encourage or persuade, any other respondent or any other dealer in the Detroit area to change his advertised or published prices.

III.

It is further ordered, That nothing contained in Parts I or II above shall be construed to prohibit: (a) any respondent association from formulating, adopting, disseminating to its members, and enforcing lawful guidelines governing the conduct of its members with respect to advertisements that such respondent association reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act; (b) any other respondent from participating in such activities as identified in Subpart (a) of an association of which such respondent is a member; or (c) any respondent from informing or advising anyone regarding what the respondent reasonably believes to be the requirements of any other existing or proposed federal, state, or local law, regulation, or order, or publishing such interpretations thereof.

IV.

It is further ordered, That the respondent association listed in Attachment C shall cease and desist from failing to maintain for five (5) years following the taking of any action against a person alleged to have violated any advertising guidelines as described in Part III of this order, in a separate file segregated by the name of any person against whom such action was taken, any document that embodies, discusses, mentions, refers, or relates to the action taken and any allegation relating to it.

V.

It is further ordered, That the respondent association listed in Attachment C shall:

A. Within sixty (60) days of the date this order becomes final, amend its by-laws to incorporate by reference this order, and provide each member with a copy of this order and the amended by-laws;

B. For three (3) years from the date this order becomes final, provide each new member with a copy of this order and the amended by-laws within thirty (30) days of the new member's admission to the association.

VI.

It is further ordered, That, for a period of three (3) years from the date this order becomes final, the respondent association listed in Attachment C shall notify the Commission at least sixty (60) days prior to the adoption of any advertising guidelines as described in Part III of this order.

VII.

It is further ordered, That each respondent shall, within sixty (60) days after this order becomes final, and then annually thereafter for a period of three (3) years, file with the Commission a report, in writing, signed by the respondent, setting forth in detail the manner and form in which it has complied with this order.

VIII.

It is further ordered, That each corporate respondent shall notify the Commission at least thirty (30) days prior to any proposed change

in that corporate respondent, such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in that corporate respondent that may affect compliance obligations arising out of this order. In the case of each natural person respondent named herein, for a period of three (3) years from the date this order becomes final, said respondent shall promptly notify the Commission of the discontinuance of his present business or employment and of any new affiliation or employment with any dealer or dealer association. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which said respondent is newly engaged, as well as a description of the respondent's duties and responsibilities in connection with the business or employment.

ATTACHMENT A

Jack Cauley Chevrolet, Inc.
7020 Orchard Lake Road
West Bloomfield, Michigan 48033

Dexter Chevrolet Co.
20811 W. Eight Mile Road
Detroit, Michigan 48219

Dick Genthe Chevrolet, Inc.
15600 Eureka Road
Southgate, Michigan 48195

Jefferson Chevrolet Co.
2130 E. Jefferson Avenue
Detroit, Michigan 48207

Lou LaRiche Chevrolet-Subaru, Inc.
40875 Plymouth Road
Plymouth, Michigan 48170

Walt Lazar Chevrolet, Inc.
12000 Telegraph Road
Taylor, Michigan 48180

Mark Chevrolet, Inc.
33200 Michigan Avenue
Wayne, Michigan 48184

George Matick Chevrolet, Inc.
14001 Telegraph Road
Redford, Michigan 48239

Matthews-Hargreaves Chevrolet Co.
1616 South Main Street
Royal Oak, Michigan 48067

Merollis Chevrolet Sales & Service, Inc.
21800 Gratiot Avenue
East Detroit, Michigan 48021

Ed Rinke Chevrolet-GMC Co.
26125 Van Dyke
Center Line, Michigan 48015

Mike Savoie Chevrolet, Inc.
1900 West Maple Road
Troy, Michigan 48084

Les Stanford Chevrolet, Inc.
21711 Michigan Avenue
Dearborn, Michigan 48123

Tennyson Chevrolet, Inc.
32570 Plymouth Road
Livonia, Michigan 48150

Buff Whelan Chevrolet, Inc.
40445 Van Dyke
Sterling Heights, Michigan 48077

Wink Chevrolet Co.
d/b/a Bill Wink Chevrolet/GMC
10700 Ford Road
Dearborn, Michigan 48126

ATTACHMENT B

John H. Cauley
Jack Cauley Chevrolet, Inc.
7020 Orchard Lake Road
West Bloomfield, Michigan 48033

Joseph B. Slatkin
Dexter Chevrolet Co.
20811 W. Eight Mile Road
Detroit, Michigan 48219

Richard E. Genthe
Dick Genthe Chevrolet, Inc.
15600 Eureka Road
Southgate, Michigan 48195

Louis H. LaRiche
Lou LaRiche Chevrolet-Subaru, Inc.
40875 Plymouth Road
Plymouth, Michigan 48170

Walter N. Lazar
Walt Lazar Chevrolet, Inc.
12000 Telegraph Road
Taylor, Michigan 48180

Harry C. Demorest
Mark Chevrolet, Inc.
33200 Michigan Avenue
Wayne, Michigan 48184

Norman A. Merollis
Merollis Chevrolet Sales & Service, Inc.
21800 Gratiot Avenue
East Detroit, Michigan 48021

Harry Tennyson
Tennyson Chevrolet, Inc.
32570 Plymouth Road
Livonia, Michigan 48150

William J. Wink, Jr.
Wink Chevrolet Co.
d/b/a Bill Wink Chevrolet/GMC
10700 Ford Road
Dearborn, Michigan 48126

ATTACHMENT C

Greater Detroit Chevrolet Dealers Association, Inc.
100 Renaissance Center, Suite 3100
Detroit, Michigan 48243

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9189. Complaint, Dec. 20, 1984—Decision, Dec. 3, 1986*

This consent order prohibits, among other things, eleven Detroit, Mich.-area Chrysler-Plymouth associations, dealerships and dealers from conspiring to not advertise in the classified sections of newspapers or to not advertise vehicle prices at all.

Appearances

For the Commission: *Dennis F. Johnson, Robert C. Jones, Richard B. Smith, Richard A. Wolff, Timothy Suich* and *Morris Bloom.*

For the respondents: *Howard E. O'Leary, Dykema, Gossett, Spencer, Goodnow & Trigg,* Washington, D.C.

DECISION AND ORDER

The Commission having heretofore issued its two count complaint charging the respondents named in the complaint issued in this matter on December 20, 1984, with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The Chrysler-Plymouth association, the Chrysler-Plymouth dealers, and the Chrysler-Plymouth individual respondents identified in Attachments A, B and C to this order, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order for Count II of the complaint, an admission by the identified respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in Count II of such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn Count II of the complaint from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having there-

*Complaint previously published at 108 F.T.C. 193.

upon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Chrysler-Plymouth dealers identified in Attachment A are all corporations with their principal places of business located at the addresses shown in Attachment A.

2. Individual respondents identified in Attachment B are officers of various Chrysler-Plymouth dealers, as shown in Attachment B, and as such they formulate, direct and control the acts and practices of the dealers for which they are officers.

3. The respondent Chrysler-Plymouth association identified in Attachment C is an incorporated trade association for Chrysler-Plymouth motor vehicle dealers with its principal place of business located at the address shown in Attachment C.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as it relates to Count II of the complaint and of the respondents listed in Attachments A, B and C, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

1. *Person* means any natural person, corporation, partnership, association, joint venture, trust or any other organization or entity, but not governmental entities.

2. *Dealer* means any person who receives on consignment, or purchases, motor vehicles for sale or lease to the public, and any director, officer, employee, representative or agent of any such person.

3. *Other dealer* means any dealer not named in this order.

4. *Dealer association* means any trade, civic, service, or social association whose membership is comprised primarily of dealers.

5. *Detroit area* means the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State of Michigan.

6. *Respondent* means any corporation listed in Attachment A, any individual listed in Attachment B, or any association listed in Attachment C, and the officers, directors, representatives, agents, divisions, subsidiaries, and successors and assigns of any listed corporation or association.

I.

It is ordered, That each respondent shall cease and desist from, directly or indirectly, or through any corporate or other device, entering into or continuing or carrying out any agreement, contract, combination or conspiracy with any respondent or any other dealer or dealer association in the Detroit area which has the purpose or effect of:

A. Restricting, regulating or limiting the advertising of any motor vehicle in the classified section of any newspaper or the advertising or publishing by any person of any price, term, or condition of sale of any motor vehicle, except to the extent that the restriction, regulation or limitation of such advertising is necessary for the purpose of engaging in lawful joint advertising; or

B. Maintaining, adopting or adhering to any policy, act or practice that restricts, regulates or limits the advertising by any person of any motor vehicle in the classified section of any newspaper or the advertising or publishing by any person of any price, term, or condition of sale of any motor vehicle, except to the extent that the restriction, regulation or limitation of such advertising is necessary for the purpose of engaging in lawful joint advertising.

II.

It is further ordered, That each respondent shall cease and desist from, directly or indirectly, or through any corporate or other device, performing any of the following acts or practices, or encouraging any person to perform any of the following acts or practices, or entering into or continuing or carrying out any agreement, contract, combination or conspiracy with any other person in the Detroit area to do or perform any of the following acts or practices:

A. Requesting, recommending, coercing, influencing, encouraging or persuading, or attempting to request, recommend, coerce, influence, encourage or persuade, any other respondent or any other dealer in the Detroit area to maintain, adopt or adhere to any policy, act or practice that restricts, regulates or limits the advertising by any person of any motor vehicle in the classified section of any newspaper or the advertising or publishing by any person of any price, term, or condition of sale of any motor vehicle, except to the extent that the restriction, regulation or limitation of such advertising is necessary for the purpose of engaging in lawful joint advertising; or

B. Requesting, recommending, coercing, influencing, encouraging or persuading, or attempting to request, recommend, coerce, influ-

ence, encourage or persuade, any other respondent or any other dealer in the Detroit area to change his advertised or published prices.

III.

It is further ordered, That nothing contained in Parts I or II above shall be construed to prohibit: (a) any respondent association from formulating, adopting, disseminating to its members, and enforcing lawful guidelines governing the conduct of its members with respect to advertisements that such respondent association reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act; (b) any other respondent from participating in such activities as identified in Subpart (a) of an association of which such respondent is a member; or (c) any respondent from informing or advising anyone regarding what the respondent reasonably believes to be the requirements of any other existing or proposed federal, state, or local law, regulation, or order, or publishing such interpretations thereof.

IV.

It is further ordered, That the respondent association listed in Attachment C shall cease and desist from failing to maintain for five (5) years following the taking of any action against a person alleged to have violated any advertising guidelines as described in Part III of this order, in a separate file segregated by the name of any person against whom such action was taken, any document that embodies, discusses, mentions, refers, or relates to the action taken and any allegation relating to it.

V.

It is further ordered, That the respondent association listed in Attachment C shall:

A. Within sixty (60) days of the date this order becomes final, amend its by-laws to incorporate by reference this order, and provide each member with a copy of this order and the amended by-laws;

B. For three (3) years from the date this order becomes final, provide each new member with a copy of this order and the amended by-laws within thirty (30) days of the new member's admission to the association.

VI.

It is further ordered, That, for a period of three (3) years from the date this order becomes final, the respondent association listed in Attachment C shall notify the Commission at least sixty (60) days prior to the adoption of any advertising guidelines as described in Part III of this order.

VII.

It is further ordered, That each respondent shall, within sixty (60) days after this order becomes final, and then annually thereafter for a period of three (3) years, file with the Commission a report, in writing, signed by the respondent, setting forth in detail the manner and form in which it has complied with this order.

VIII.

It is further ordered, That each corporate respondent shall notify the Commission at least thirty (30) days prior to any proposed change in that corporate respondent, such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in that corporate respondent that may affect compliance obligations arising out of this order. In the case of each natural person respondent named herein, for a period of three (3) years from the date this order becomes final, said respondent shall promptly notify the Commission of the discontinuance of his present business or employment and of any new affiliation or employment with any dealer or dealer association. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which said respondent is newly engaged, as well as a description of the respondent's duties and responsibilities in connection with the business or employment.

ATTACHMENT A

Birmingam Chrysler-Plymouth, Inc.
2100 West Maple Road
Troy, Michigan 48084

Lochmoor Chrysler-Plymouth, Inc.
18165 Mack Avenue
Detroit, Michigan 48224

Shelby Oil Company, Inc.
d/b/a Monicatti Chrysler-Plymouth Sales
40755 Van Dyke Avenue
Sterling Heights, Michigan 48078

Roseville Chrysler-Plymouth, Inc.
25800 Gratiot Avenue
Roseville, Michigan 48006

Bill Snethkamp, Inc.
16430 Woodward Avenue
Highland Park, Michigan 48006

Thompson Chrysler-Plymouth, Inc.
16225 Fort Street
Southgate, Michigan 48195

Westborn Chrysler-Plymouth, Inc.
23300 Michigan Avenue
Dearborn, Michigan 48124

ATTACHMENT B

Robert M. Brent
Warren Chrysler-Plymouth, Inc.
32711 Van Dyke Avenue
Warren, Michigan 48093

James Riehl
Roseville Chrysler-Plymouth, Inc.
25800 Gratiot Avenue
Roseville, Michigan 48006

William Snethkamp
Bill Snethkamp, Inc.
16430 Woodward Avenue
Highland Park, Michigan 48023

ATTACHMENT C

Chrysler-Plymouth Dealers Association of Greater Detroit, Inc.
32711 Van Dyke
Warren, Michigan 48093

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9189. Complaint, Dec. 20, 1984—Decision, Dec. 3, 1986*

This consent order prohibits, among other things, thirteen Detroit, Mich.-area Cadillac associations, dealerships and dealers from conspiring to not advertise in the classified sections of newspapers or to not advertise vehicle prices at all.

Appearances

For the Commission: *Dennis F. Johnson, Robert C. Jones, Richard B. Smith, Richard A. Wolff, Timothy Suich* and *Morris Bloom.*

For the respondents: *Lawrence F. Raniszeski* and *Robert Y. Weller, Colombo & Colombo,* Birmingham, Mich. and *James F. Rill, Jeffrey W. King* and *Christopher J. MacAvoy, Collier, Shannon, Rill & Scott,* Washington, D.C.

DECISION AND ORDER

The Commission having heretofore issued its two count complaint charging the respondents named in the complaint issued in this matter on December 20, 1984, with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The Cadillac association, the Cadillac dealers, and the Cadillac individual respondents identified in Attachments A, B and C to this order, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order for Count II of the complaint, an admission by the identified respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in Count II of such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn Count II of the complaint from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Cadillac dealers identified in Attachment A are all corporations with their principal places of business located at the addresses shown in Attachment A.

2. Individual respondents identified in Attachment B are officers of various Cadillac dealers, as shown in Attachment B, and as such they formulate, direct and control the acts and practices of the dealers for which they are officers.

3. The respondent Cadillac association identified in Attachment C is an incorporated trade association for Cadillac motor vehicle dealers with its principal place of business located at the address shown in Attachment C.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as it relates to Count II of the complaint and of the respondents listed in Attachments A, B and C, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

1. *Person* means any natural person, corporation, partnership, association, joint venture, trust or any other organization or entity, but not governmental entities.

2. *Dealer* means any person who receives on consignment, or purchases, motor vehicles for sale or lease to the public, and any director, officer, employee, representative or agent of any such person.

3. *Other dealer* means any dealer not named in this Order.

4. *Dealer association* means any trade, civic, service, or social association whose membership is comprised primarily of dealers.

5. *Detroit area* means the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State of Michigan.

6. *Respondent* means any corporation listed in Attachment A, any individual listed in Attachment B, or any association listed in Attachment C, and the officers, directors, representatives, agents, divisions, subsidiaries, and successors and assigns of any listed corporation or association.

I.

It is ordered, That each respondent shall cease and desist from, directly or indirectly, or through any corporate or other device, entering into or continuing or carrying out any agreement, contract, combination or conspiracy with any respondent or any other dealer or dealer association in the Detroit area which has the purpose or effect of:

A. Restricting, regulating or limiting the advertising of any motor vehicle in the classified section of any newspaper or the advertising or publishing by any person of any price, term, or condition of sale of any motor vehicle, except to the extent that the restriction, regulation or limitation of such advertising is necessary for the purpose of engaging in lawful joint advertising; or

B. Maintaining, adopting or adhering to any policy, act or practice that restricts, regulates or limits the advertising by any person of any motor vehicle in the classified section of any newspaper or the advertising or publishing by any person of any price, term, or condition of sale of any motor vehicle, except to the extent that the restriction, regulation or limitation of such advertising is necessary for the purpose of engaging in lawful joint advertising.

II.

It is further ordered, That each respondent shall cease and desist from, directly or indirectly, or through any corporate or other device, performing any of the following acts or practices, or encouraging any person to perform any of the following acts or practices, or entering into or continuing or carrying out any agreement, contract, combination or conspiracy with any other person in the Detroit area to do or perform any of the following acts or practices:

A. Requesting, recommending, coercing, influencing, encouraging or persuading, or attempting to request, recommend, coerce, influence, encourage or persuade, any other respondent or any other dealer in the Detroit area to maintain, adopt or adhere to any policy, act or practice that restricts, regulates or limits the advertising by any person of any motor vehicle in the classified section of any newspaper or the advertising or publishing by any person of any price, term, or condition of sale of any motor vehicle, except to the extent that the restriction, regulation or limitation of such advertising is necessary for the purpose of engaging in lawful joint advertising; or

B. Requesting, recommending, coercing, influencing, encouraging or persuading, or attempting to request, recommend, coerce, influ-

ence, encourage or persuade, any other respondent or any other dealer in the Detroit area to change his advertised or published prices.

III.

It is further ordered, That nothing contained in Parts I or II above shall be construed to prohibit: (a) any respondent association from formulating, adopting, disseminating to its members, and enforcing lawful guidelines governing the conduct of its members with respect to advertisements that such respondent association reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act; (b) any other respondent from participating in such activities as identified in Subpart (a) of an association of which such respondent is a member; or (c) any respondent from informing or advising anyone regarding what the respondent reasonably believes to be the requirements of any other existing or proposed federal, state, or local law, regulation, or order, or publishing such interpretations thereof.

IV.

It is further ordered, That the respondent association listed in Attachment C shall cease and desist from failing to maintain for five (5) years following the taking of any action against a person alleged to have violated any advertising guidelines as described in Part III of this order, in a separate file segregated by the name of any person against whom such action was taken, any document that embodies, discusses, mentions, refers, or relates to the action taken and any allegation relating to it.

V.

It is further ordered, That the respondent association listed in Attachment C shall:

A. Within sixty (60) days of the date this order becomes final, amend its by-laws to incorporate by reference this order, and provide each member with a copy of this Order and the amended by-laws;

B. For three (3) years from the date this order becomes final, provide each new member with a copy of this order and the amended by-laws within thirty (30) days of the new member's admission to the association.

VI.

It is further ordered, That, for a period of three (3) years from the date this order becomes final, the respondent association listed in Attachment C shall notify the Commission at least sixty (60) days prior to the adoption of any advertising guidelines as described in Part III of this order.

VII.

It is further ordered, That each respondent shall, within sixty (60) days after this order becomes final, and then annually thereafter for a period of three (3) years, file with the Commission a report, in writing, signed by the respondent, setting forth in detail the manner and form in which it has complied with this order.

VIII.

It is further ordered, That each corporate respondent shall notify the Commission at least thirty (30) days prior to any proposed change in that corporate respondent, such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in that corporate respondent that may affect compliance obligations arising out of this order. In the case of each natural person respondent named herein, for a period of three (3) years from the date this order becomes final, said respondent shall promptly notify the Commission of the discontinuance of his present business or employment and of any new affiliation or employment with any dealer or dealer association. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which said respondent is newly engaged, as well as a description of the respondent's duties and responsibilities in connection with the business or employment.

ATTACHMENT A

Audette Cadillac, Inc.
7100 Orchard Lake Road
West Bloomfield, Michigan 48033

Crissman Cadillac, Inc.
1350 North Woodward Avenue
Birmingham, Michigan 48012

Charles Dalgleish Cadillac-Peugeot, Inc.
6160 Cass Avenue
Detroit, Michigan 48202

Dreisbach & Sons Cadillac Co.
24600 Grand River Avenue
Detroit, Michigan 48219

Arnold Jerome Cadillac, Inc.
675 S. Saginaw
Pontiac, Michigan 48053

Roger Rinke Cadillac Co.
8333 East Eleven Mile Road
Warren, Michigan 48093

ATTACHMENT B

Charles Audette
Audette Cadillac, Inc.
7100 Orchard Lake Road
West Bloomfield, Michigan 48033

Frank Audette
Audette Cadillac, Inc.
7100 Orchard Lake Road
West Bloomfield, Michigan 48033

Charles Dalgleish, Jr.
Charles Dalgleish Cadillac-Peugeot, Inc.
6160 Cass Avenue
Detroit, Michigan 48202

Douglas Dalgleish
Charles Dalgleish Cadillac-Peugeot, Inc.
6160 Cass Avenue
Detroit, Michigan 48202

Thomas S. Dreisbach
Dreisbach & Sons Cadillac Co.
24600 Grand River Avenue
Detroit, Michigan 48219

Roger J. Rinke
Roger Rinke Cadillac Co.
8333 East Eleven Mile Road
Warren, Michigan 48093

ATTACHMENT C

Metro Detroit Cadillac Dealers Association, Inc.
100 Renaissance Center, Suite 3100
Detroit, Michigan 48243

IN THE MATTER OF

COSMO COMMUNICATIONS CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3203. Complaint, Dec. 12, 1986—Decision, Dec. 12, 1986

This consent order prohibits, among other things, a Miami, Fla. manufacturer and seller of telephones from misrepresenting that its phones are capable of generating the tones necessary to access alternative long distance and banking services that require touch-tone phones.

Appearances

For the Commission: *Joel C. Winston* and *Steven A. Shaffer.*

For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Cosmo Communications Corporation, a corporation, ("Cosmo" or "respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Cosmo is a Florida corporation, with its offices and principal place of business located at 16501 N.W. 16th Court, Miami, Florida.

PAR. 2. Respondent manufactures, advertises, offers for sale, and sells consumer premises telephones and telephone equipment, including pushbutton pulse-only-generating ("touch pulse") telephones.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical of respondent's representations for certain of its touch pulse telephones, but not necessarily all-inclusive thereof, are those on the package label attached hereto as Exhibits A and B. The aforesaid representations include the following:

(a) "Works with rotary and touchtone systems." (Exhibits A and B)

(b) "ALL COSMO pulse/tone switchable circuitry telephones offer push button rotary lines and tone dialing systems and are compatible with MCI, ITT, AT&T, Sprint and Network systems." (Exhibit B)

(c) A picture of the face of the telephone prominently displaying its pushbutton keypad. (Exhibits A and B)

PAR. 5: Through the use of the statements and depictions referred to in Paragraph Four and other representations not specifically set forth herein, respondent has represented, directly or by implication, that:

(a) Respondent's touch pulse telephones are capable of generating tones to complete a call.

(b) Respondent's touch pulse telephones will permit the purchaser to use all available phone-accessed services requiring tone-generating telephones, such as alternative long distance service carriers and computerized bill paying and account transaction services.

PAR. 6. In truth and in fact,

(a) Respondent's touch pulse telephones are not capable of generating tones to complete a call; and

(b) Respondent's touch pulse telephones will not permit the purchaser to use all available phone-accessed services requiring tone-generating telephones, such as alternative long distance service carriers and computerized bill paying and account transaction services.

Therefore, respondent's representations as set forth in Paragraph Five were and are false and misleading.

PAR. 7. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Chairman Oliver and Commissioner Azcuenaga were recorded as voting in the negative.

EXHIBIT A

cosmo
TR-3000
cosmo
CORDLESS TELEPHONE
• Contemporary styling looks good at home or office
• No additional monthly charges
• Eliminates inconvenience of a cord
• Make and receive calls indoors or out
• 700 Foot range
• Advanced solid state circuitry
• Re-dial button instantly recall last number dialed
• Works with rotary and touchtone systems
• Instant on/off makes operation easy
• Works like a standard phone but has more features
• Automatic lock prevents unauthorized use

EXHIBIT B

Cosmo
Cordless Phone
1000 FT Range
Convertible for Wall or Desk
10 Channel 46/49
2 YEAR
Cosmo
Cordless Phone
1000 FT Range
• 10 Channel 46/49 Frequency
• Eliminates Inconvenience of a Cord
• Make and Receive Calls in/ doors and Outdoors
• 1000 Ft. Range
• Advanced Solid State Circuitry
• Last Number Redial
• Works with Rotary and Touch Tone Systems
• Instant On/Off Operation
• Automatic Lock Prevents Unauthorized use.
• "Call" Feature from the Base Unit to the Remote
• Nicade Batteries are Rechargeable at the Base Unit
• Push Button Dialing
• Belt Clip Included
• Modular Jack Plugs
• Two Tone Security Guard

EXHIBIT B

Cosmo
Cordless Phone
1000 FT Range
Cosmo
Cordless Phone
1000 FT Range
COSMO COMMUNICATIONS CORPORATION produces a complete line of single and multi-function telephone products to make any task simple. All of our telephone products are manufactured with the highest quality materials and warranted to perform to your satisfaction. Ask your COSMO dealer for our other fine products designed today for all your future needs.
ALL COSMO pulse/tone switchable circuitry telephones offer push button rotary lines and tone dialing systems and are compatible with MCI, ITT, AT&T, Sprint and Network systems.
ATTENTION: This phone is NOT hearing aid compatible. See user instructions.
FCC APPROVED
2 Year Limited Warranty
UL APPROVED
Push Button Dialing
Last Number Redial
2 YEAR

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Cosmo Communications Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 16501 N.W. 16th Court in the City of Miami, State of Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent Cosmo Communications Corporation, a corporation; its successors and assigns; and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertis-

ing, offering for sale, sale or distribution of any consumer premises telephone or other telephone communication device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing in any manner, directly or by implication, that any such device is capable of generating the tones necessary to complete a call, unless such is the case.

B. Misrepresenting in any manner, directly or by implication, the compatability of any such device with any tone-accessed telephone service, including, but not limited to, alternative long distance service carriers and phone-accessed computer services.

C. Failing to disclose, clearly and prominently, on the package label for each such device in the custody or control of respondent (including existing inventory) that operates by pushbuttons but does not generate tones:

"Pulse Telephone: Operates by pulse dialing like a rotary telephone. Will not produce tones.";

provided, however, that after seven (7) years from the date of service of this order the above disclosure may be replaced by the disclosure, "Pulse Telephone"; and *provided further, however,* that this order shall not be construed to relieve respondent, its successors and assigns from having to comply with any provision of any federal, state, or local law, rule, regulation, or order requiring a disclosure different from that specified by this order, and, in the event any such law, rule, regulation, or order requires an equally or more comprehensive disclosure concerning the pulse operating system and the inability of the device to produce tones, that disclosure may be used in place of the disclosure specified by this order.

II.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

III.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it and at such other times as the

Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Chairman Oliver and Commissioner Azcuenaga were recorded as voting in the negative.

IN THE MATTER OF

ORKIN EXTERMINATING COMPANY, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9176. Complaint, May 8, 1984—Final Order, Dec. 15, 1986

This Final Order requires an Atlanta, Georgia-based exterminating company to roll back the "lifetime" annual renewal fees on contracts signed prior to 1975 to the fixed fee established prior to a 1980 raise in price. Respondent is also required to notify each affected customer.

Appearances

For the Commission: *Katharine B. Alphin* and *Chris M. Couillou.*

For the respondents: *John C. Staton, Michael E. Ross* and *Sylvia M. King, King & Spaulding,* Atlanta, Ga.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Orkin Exterminating Company, Inc., a corporation, has violated the provisions of Section 5(a) of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Orkin Exterminating Company, Inc., is a Delaware corporation with its principal place of business located at 2170 Piedmont Road, N.E., Atlanta, Georgia.

PAR. 2. Respondent maintains, and at all times mentioned in this complaint has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Among other services, respondent provides to individuals and businesses ("consumers") services to treat houses, buildings, and other structures ("structures") in order to destroy and protect against termites and other wood-infesting organisms ("termite-control services").

PAR. 4. In numerous instances, in the course of advertising, promot-

ing, selling, and performing its termite-control services, respondent agreed for the life of the structure to reinspect the consumer's structure annually and, if necessary, to either retreat or retreat and repair the structure, provided the consumer paid a specified fixed annual renewal fee.

PAR. 5. In contradiction of the agreements described in Paragraph Four, in numerous instances beginning in [2] 1980 and continuing to the present, respondent has raised, or has attempted to raise, the agreed-upon annual renewal fee for its termite-control services.

PAR. 6. Respondent's actions described above have thus caused substantial and ongoing injury to respondent's customers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.

PAR. 7. Respondent's acts and practices as herein alleged were and are to the prejudice and injury of the public and constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

INITIAL DECISION BY

ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

APRIL 22, 1985

PRELIMINARY STATEMENT

The complaint herein issued on May 8, 1984, charging Orkin Exterminating Company, Inc., (hereinafter "Orkin") with violation of Section 5(a) of the Federal Trade Commission Act. The complaint alleges that respondent Orkin provides to individuals and businesses services to treat houses, buildings, and other structures in order to destroy and protect against termites and other wood-infesting organisms. In numerous instances, in the course of advertising, promoting, selling and performing its termite-control services, Orkin agreed to reinspect the consumer's structure annually for the life of the structure and, if necessary, to either retreat or retreat and repair the structure, provided the consumer paid a specified fixed annual renewal fee.

In contradiction of the agreements described above, in numerous instances beginning in 1980 and continuing to the present, Orkin has raised, or has attempted to raise, the agreed-upon annual renewal fee for its termite-control services. It is alleged that Orkin's actions in raising or attempting to raise [2] the fixed annual renewal fee have caused substantial and ongoing injury to Orkin's customers that is not outweighed by countervailing benefits to consumers or competition

and is not reasonably avoidable by consumers, and were and are to the prejudice and injury of the public and constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Orkin filed an answer on June 18, 1984, generally denying the charging allegations of the complaint and asserting eleven defenses, including: a claim that the complaint fails to state a violation of law; that the Commission issued the complaint without reason to believe that Orkin had violated the law; that the Commission violated its own policy set forth in its *Operating Manual* to defer to state and local authorities to obtain corrective action in matters primarily intrastate in nature or effect; that the Commission lacks subject matter jurisdiction over the complaint allegations; that the acts and practices of Orkin as alleged in the complaint were and are not to the prejudice and injury of the public and do not constitute unfair acts or practices in or affecting commerce; that the acts and practices alleged to have been committed by Orkin have not caused substantial and ongoing injury to Orkin's customers; that the complaint is barred by applicable statute(s) of limitations; that the alleged unlawful acts and practices have been encouraged, approved, and/or compelled by federal and state regulatory authorities and law and are therefore exempt from the Federal Trade Commission Act; that the consumers alleged to have been injured by Orkin's acts and practices have recognized, accepted, and acquiesced to the alleged misconduct under doctrines of waiver, estoppel, ratification, accord and satisfaction, limitations, and latches; and that the relief proposed is inappropriate, not in the public interest, and is not or would not be authorized by law.

In response to a motion by complaint counsel, not objected to by respondent Orkin, Paragraph 3 of the complaint was amended to add "and wood decay" as an additional contract service falling within the category of services alleged in the complaint as having the fixed annual renewal fee raised in contradiction to agreements with consumers. (Order Amending Complaint, November 15, 1984) Also, in response to a motion by complaint counsel, respondent Orkin's Second Defense (challenging the Commission's "reason to believe" Orkin had violated Section 5(a) of the Federal Trade Commission Act), Third Defense (stating that the Commission had violated its policy stated in the Operating Manual to defer to state and local authorities to obtain corrective action in matters primarily intrastate in nature and effect), and the introductory paragraph to Orkin's Twelfth Defense (challenging the Commission's "reason to believe" and "public interest" determinations in issuing the complaint) were stricken. (Order Ruling On Complaint Counsel's Motion To Strike . . . , August 7, 1984) [3]

A prehearing conference was held on August 9, 1984. At the confer-

ence Orkin's counsel was urged to stipulate to the commerce allegations of the complaint. (Prehearing Transcript, pp. 11–14, 60) Thereafter, during the course of pretrial discovery, Orkin stipulated that it maintains, and at all times mentioned in the complaint has maintained, a substantial course of business, including the acts and practices as set forth in the complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. (Finding 3, *infra*)

By motion dated January 30, 1985, complaint counsel has moved for summary decision as to all issues to be resolved in this proceeding. Complaint counsel's motion is supported by the pleadings heretofore filed in this proceeding, depositions of respondent's officials, documents created, sent or received by respondent during the course of its business operations and received by complaint counsel from respondent during the investigation which preceded issuance of the complaint herein or during pretrial discovery, and some few third party documents received by complaint counsel from state agencies and consumers which have been adequately authenticated by complaint counsel for purposes of ruling on this motion.

Respondent has filed an opposition, dated March 1, 1985, to complaint counsel's motion. Respondent has also filed a motion for summary decision in its favor, and has submitted affidavits and depositions from its officials, competitors, consumers, one economic expert, and certain of its documents. Respondent also has submitted statements of material fact which it contends either directly contravene complaint counsel's findings of fact, or raise genuine issues of inference and legal significance that foreclose any entry of summary decision in favor of complaint counsel.

Respondent, additionally, has filed a supplemental brief, dated March 8, 1985, and a reply and answer brief, dated March 27, 1985, which additional briefing is or has been authorized. Complaint counsel filed a reply to respondent's opposition and motion on March 16, 1985, which also was authorized.

Respondent's submissions and arguments contend that: Orkin's alleged breach of contract is not actionable under Section 5 of the Federal Trade Commission Act because it is at most a non-deceptive alleged breach of a putative contractual promise as to which the agreements in question are entirely silent; that Orkin's contracts in issue do not provide for fixed annual renewal premiums but are of an indefinite duration and hence may be terminated after a reasonable period of time; and, that the alleged breach of contracts are not an "unfair act or practice" in violation of Section 5 because there is no unjustified consumer injury. Respondent also contends that any consideration of complaint counsel's requested relief is premature. [4]

Section 3.24 of the Commission's Rules of Practice authorizes any party to move with or without supporting affidavits for a summary decision in his favor upon all or any part of the issues being adjudicated. The granting of such a motion is authorized where the affidavits and other evidence relied upon "show that there is no genuine issue as to any material fact and that the moving party is entitled to such a decision as a matter of law." (Section 3.24(a)(2)) Any such decision shall constitute the initial decision of the Administrative Law Judge.

Section 3.24 closely parallels Rule 56 of the Federal Rules of Civil Procedure. *The Hearst Corporation,* 80 F.T.C. 1011, 1014 (1972) Summary judgment under Rule 56 may be granted only if there is no genuine issue as to any material fact or the inferences to be drawn from the undisputed facts. *United States v. Diebold, Inc.,* 369 U.S. 654 (1962); *Winters v. Highlands Ins.* 569 F.2d 297 (5th Cir. 1978); *Handi Inv. Co. v. Mobil Oil Co.,* 550 F.2d 543 (9th Cir. 1977); *Weiss v. Kay Jewelry Stores, Inc.,* 470 F.2d 1259, 1261-62 (D.C. Cir. 1972) The moving party has the burden of establishing that no genuine issue of material fact exists; all doubts and inferences are resolved against the movant; and summary judgment is improper if conflicting inferences may be drawn from the same evidence. *Exnicious v. United States,* 563 F.2d 418 (10th Cir. 1977) This same standard has been accepted in Federal Trade Commission proceedings. *The Hearst Corporation, supra; American Medical Association,* Dkt. 9064, slip op. at 5 (Order Denying Motion of Respondent The American Medical Association ("AMA") For Summary Decision Dismissing The Complaint For Lack of Jurisdiction, Apr. 26, 1976)[94 F.T.C. 701 (1979)].

Full consideration has been given to the findings of fact and legal arguments presented by the parties. The Findings of Fact which follow are based on reliable evidence as to which there is no dispute as to its authenticity or genuiness. A careful study of the evidence relied upon by the parties reveals that there is no genuine issue as to any of the material facts to be concluded from such evidence, or as to the relevant inferences which logically can be drawn from such facts. Therefore, summary decision is appropriate.

All motions not previously ruled upon are denied. Based on the evidence presented by the parties hereto in support of and in opposition to motions for summary decision, the following Findings of Fact are without substantial dispute.

I. Findings of Fact

1. Orkin Exterminating Company, Inc., ("Orkin") is a Delaware corporation with its principal place of business located at 2170 Piedmont Road, N.E., Atlanta Georgia. (Complaint, ¶1; Answer, Twelfth

Defense, Paragraph 1) Orkin is a wholly-owned [5] subsidiary of Rollins, Inc. (CX 142C) Rollins acquired Orkin on September 10, 1964. (RIR 30)[1] [6]

2. Orkin provides pest-control and exterminating services throughout the United States, but mostly in the Southeast. (Respondent's Motion for Access, p. 2) In 1980, Orkin served customers located in 47 states and the District of Columbia. (CX 142C) As of September 1, 1980, Orkin operated approximately 294 branch offices and 44 district offices. (RIR 32) Branch offices are supervised by the district offices. (CX 142Z9; Russell Dep. p. 9; Raymond Dep. p. 32)

3. Orkin has stipulated that it maintains, and at all times men-

[1] The following abbreviations are used in citations in this decision:

CX	Complaint counsel's exhibits as listed on complaint counsel's Preliminary Document List and amendments and filed in support of complaint counsel's Motion For Summary Decision.
RX	Respondent's exhibits as listed on its Preliminary Document List and amendments filed in support of respondent's Motion For Summary Decision and in opposition to complaint counsel's Motion For Summary Decision.
RIR	Respondent's Responses to Complaint Counsel's First Set of Interrogatories, response to interrogatory #.
RA	Respondent's Answers and Objections To Counsel's First Request For Admissions, response to request for admission #.
CRA	Complaint counsel's First Request for Admissions, request #.
F	Findings of Fact in this initial decision, finding #.
Respondent's Motion for Access	Respondents motion for Issuance of an Order Requiring Access to Documents, dated June 28, 1984.
(Name) Dep.	Deposition of person identified.
(Name) Dep. Ex.	Exhibit to deposition of person identified.
(Name) Aff.	Affidavit of person identified.

The persons whose depositions and affidavits are cited in this decision are identified as follows:

Geiger	Earl Geiger, Vice Chairman of Rollins, Inc. (F 11).
Kimbell	Ron Kimbell, Orkin Commercial Branch Manager (Kimbell Dep. p. 4), formerly Director of Customer Services of Rollins, Inc. (F 47).
Raymond	John Raymond, Director of Administrative Operations of Orkin (F 54, 57).
Rollins	Gary W. Rollins, President of Rollins, Inc. (F 38).
Russell	Robert M. Russell, Vice-President of Government Relations of Orkin (F 61).
Schneider	James M. Schneider, General Counsel of Rollins, Inc. (F 55).
Boudreaux	Dr. Kenneth J. Boudreaux, Professor of Economics and Finance, Graduate School of Business, Tulane University.
Bourgeois	Ernest R. Bourgeois, owner and President, Mr. B's Services, Inc.
Childs	Janet Childs, Receivables Audit Supervisor, Orkin.
Edwards	Jack L. Edwards, retired, formerly President, Ja-Roy Exterminating Co., Inc.
Goodman	Bryant G. Goodman, Branch Manager, Orkin.
Hoffman	William S. Hoffman, an Orkin customer.
Hromada	Charles Hromada, Senior Vice President of Technical Services, Terminix International, Inc.
Jones	Joe Jones, Branch Manager, Orkin.
Landry	Ulysse G. Landry, Jr., owner and operator of Houma Pest Control Company, Inc.
Nolen	Truly D. Nolen, founder and President of Truly Nolen of America, Inc.
Terrebonne	Ellis A. Terrebonne, an Orkin customer.
Thompson	Helen R. Thompson, an Orkin customer.

Portions of depositions of some deponents appear in complaint counsel's motion, in Orkin's motion and opposition, and in complaint counsel's answer submissions. [7]

tioned in the complaint has maintained, a substantial course of business, including the acts and practices as set forth in the complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. (Letter to Katharine B. Alphin from Michael Eric Ross dated August 17, 1984, at paragraph 10; one page letter to Katharine B. Alphin from Michael Eric Ross dated August 24, 1984; RIR 66; *compare* letter to John C. Staton, Jr. from Katharine B. Alphin dated August 21, 1984, at paragraph 9, *with* two page letter to Katharine B. Alphin from Michael Eric Ross dated August 24, 1984)

4. Orkin is stated to be the world's largest termite and pest control company. (CX 142C; Rollins Dep. p. 202) Even though Orkin is the largest termite and pest control company, it apparently has a small market share. (Rollins Dep. p. 203; Geiger Dep. p. 16)

5. To be a provider of termite control services on a small scale requires little capital. (Rollins Dep. pp. 204–205) Chemicals used in termite control are commonly available. (Rollins Dep. p. 205) The techniques used in termite control services are widely known within the industry and can be learned without difficulty. (Rollins Dep. pp. 206–207)

6. Orkin has used a July 1 - June 30 fiscal year for each of the years 1978 through 1984. (RIR 57) Orkin had total net revenues in the amounts indicated in the following fiscal years:

Fiscal Year Ending	Total Net Revenue
June, 1977	$138,613,108
June, 1978	148,362,959
June, 1979	164,826,769
June, 1980	181,582,829
June, 1981	193,568,292
June, 1983	212,333,107
June, 1984	228,898,037

(RA 4–10)

Orkin had the net profits indicated in the following fiscal years: [8]

Fiscal Year Ending	Net Profit
June, 1977	$22,428,534
June, 1978	19,258,821
June, 1979	17,140,842
June, 1980	23,744,000*
June, 1981	27,142,000*
June, 1983	30,127,691
June, 1984	31,548,071

(RA 11–17 [*Rounded to the nearest thousand])

Orkin had a net worth of $65,949,714.89 on June 30, 1980 and a net

worth of $68,659,753 on June 30, 1984. (RA 18, 19; Respondent's Corrected Answer To Request No. 18 Of First Request For Admissions)

7. Among other services, Orkin provides to individuals and businesses services to treat houses, buildings, and other structures in order to destroy or protect against termites, other wood-infesting organisms, moisture and wood decay. (Complaint, ¶ 3; Answer, Twelfth Defense, Paragraph 3; RA 1; Raymond Dep. pp. 22–23; Rollins Dep. pp. 15–16; Kimbell Dep. pp. 4, 6–7; Russell Dep. p. 13)

8. Orkin has entered into written agreements with its customers concerning the rendering of services to destroy or protect against termites, other wood-infesting organisms, moisture and wood decay. These agreements are hereinafter referred to as "termite contracts." (Geiger Dep. p. 11; CX 1–7, 9–14, 16, 27, 400, 414, 449, 473, 485; RA 2; RIR 59–60) The termite contracts charged a specified sum for the initial treatment provided by Orkin. (CX 1–7, 9–14, 16, 27, 400, 414, 449, 473, 485)

9. Under certain conditions Orkin issued guarantees of its services to destroy or protect against termites, other wood-infesting organisms, moisture and wood decay. These guarantees are hereinafter referred to as "termite guarantees." (Raymond Dep. pp. 18–23; Rollins Dep. pp. 18–19; Russell Dep. p. 13; CX 17–26; RA 3; RIR 61–62)

10. Since prior to 1956, Orkin has used preprinted form contracts and guarantees prepared by Orkin. (Geiger Dep. pp. 11, 21–22, 24–25; CX 1–14, 16, 27, 400, 414, 449, 473, 485; RX 129A–Z46, 685A-B) Orkin salesmen did not have the authority to vary the terms of the preprinted form contracts and guarantees. (Geiger Dep. p. 11)

11. In general, prior to 1966, Orkin offered termite guarantees for continued protection to the treated property for a specified price which lasted for a term of from five to fifteen years. (RIR 4; RX 129A-Z46; Geiger Aff. ¶ 4) On or about January 1, 1966, Orkin began using the term "lifetime" in its [**9**] termite contracts and/or termite guarantees. (RIR 1) Earl F. Geiger, Vice Chairman of the Board of Rollins, Inc., who was Executive Vice-President of Orkin from 1964 to 1976, originated the "lifetime" guarantee concept for Orkin and proposed its adoption by Orkin. (RIR 2; Geiger Dep. pp. 4–5, 15) Mr. Truly D. Nolen, founder, owner, and President of Truly Nolen of America, Inc., claims to have originated the idea of the lifetime guarantee on termite control services contracts in 1955. (Nolen Aff. ¶ 6) Other Orkin competitors use the lifetime concept. (Hromada Aff. ¶ 5)

12. Concerning the purpose of the lifetime guarantees, Mr. Geiger has given the following testimony:

Q. What was the purpose of these new lifetime guarantees?

A. Well, Orkin at that time was the largest pest control company in the country. We

did 80% of the advertising for the pest control industry, or roughly that. We claimed just about 13% of the business. The obvious strategy was to try to offer a distinctly better service to the public than our smaller competitors could offer. So any time you could enhance your package, your marketing package, you did so.

Q. And that was the reason for the lifetime?

A. Yes. We were able to do it because the primary termiticide at that time was proving to be more successful and more effective than we ever thought it would be.

(Geiger Dep. pp. 16–17)

13. Termite guarantees issued by Orkin include a lifetime retreatment guarantee, a lifetime retreatment and repair guarantee, and a lifetime guarantee on pretreatment work on new construction. (Raymond Dep. p. 19–20)

14. The lifetime retreatment guarantee provides in part that at no extra cost to the customer Orkin will apply any necessary treatment to the premises if infestation occurs during the duration of the guarantee. (Rollins Dep. p. 18; CX 17–22; RIR 61) This type of guarantee is sometimes referred to as a "LC guarantee." (Rollins Dep. p. 18; Raymond Dep. p. 20)

15. The lifetime retreatment and repair guarantee provides in part that at no extra cost to the customer, Orkin will make repairs (up to a stated dollar maximum) to the structure and its contents in order to remedy any new damage caused by subterranean termites, provided that it is established that the new damage occurred after the initial treatment, and that at the time of [10] discovery of the new damage, the damaged areas are infested with live subterranean termites. (Rollins Dep. p. 18; CX 23–26; RIR 61) This type of guarantee is sometimes referred to as a "LR guarantee." (Rollins Dep. p. 19; Raymond Dep. p. 19)

16. Prior to 1969, Orkin's LR guarantees had a liability limitation of $25,000. In 1969, Orkin adopted a policy of issuing LR guarantees with a liability limitation of $100,000. (RIR 63)

17. The lifetime guarantee on pretreatment work is the same guarantee as the LR guarantee, except that Orkin's pretreatment guarantee is for new construction and its LR guarantee covers existing structures. (RA 21; CX 150A-B) The lifetime pretreatment guarantee is sometimes referred to as a "PR guarantee." (Raymond Dep. pp. 19–20)

18. Orkin's termite contracts and termite guarantees provide for annual fees to be paid in order to continue the protection that is guaranteed. If the customer abides by the contract, and pays Orkin the specified annual renewal fee, the guarantee is to remain in effect. (CX 1A, 2A, 3, 4A, 5A, 6A, 7A, 9A, 10A, 11A, 12A, 13A, 14A, 16A, 27A, 400A, 414A, 449A, 473A, 485A; Respondent's Motion for Access, pp. 2–3)

19. Orkin's termite contracts and termite guarantees, including those entered into prior to February 1, 1975, that used the term "lifetime," had a "structural modification" clause providing that in the event the premises were structurally modified, altered or otherwise changed after the date of initial treatment, the agreement would terminate, unless a prior written agreement was entered into by the purchaser for Orkin to reinspect the premises, provide additional treatment, and/or adjust the annual renewal fee. (CX 1B, 2B, 4B, 5B, 6B, 7C, 9B, 10B, 11B, 12B, 13B, 14B, 16B, 17A, 18A, 19A-B, 20A-B, 21A-B, 22, 24A-B, 25A-B, 26A-B, 27B, 400B, 414B, 449B, 473B, 485B; RIR 20, 59–62)

20. Before February 1, 1975, Orkin's termite contracts and termite guarantees that included the term "lifetime" did not mention adjustments or increases of the specified annual renewal fee necessary to continue the lifetime guarantees issued with respect to those contracts, absent the treated premises being structurally modified, altered, or otherwise changed after the date of initial treatment. (CX 1A-B, 2A-B, 3, 4A-B, 5A-B, 6A-B, 7A-C, 9A-B, 10A-B, 11A-B, 12A-B, 13A-B, 14A-B, 16A-B, 17A-B, 18A-B, 19A-B, 20A-B, 21A-B, 22, 24A-B, 25A-B, 26A-B, 27A-B, 400A-B, 414A-B, 449A-B, 473A-B, 485A-B; RIR 20, 59–62; Respondent's Motion for Access, p. 3) These termite contracts are hereinafter referred to as "pre-1975 contracts." Likewise, guarantees extended by Orkin to a customer in connection with the execution of a pre-1975 contract are referred to as "pre-1975 guarantees," and customers holding these contracts or guarantees are often referred to as "pre-1975 customers." [11]

21. Numerous pre-1975 contract forms contained a clause stating that the contract, graph and specification sheets, and upon issuance, the guarantee, constituted the complete agreement between the parties, and that the agreement could not be changed or altered in any manner, oral or otherwise, by any representatives of Orkin, unless alterations or changes were in writing and executed by a corporate officer of Orkin under the corporate seal. (CX 400A-B [Form 225 Rev. 1–69]; CX 9A-B; CX 473A-B; CX 10A-B [Form F–19–135 Rev. 11/70]; CX 414A-B; CX 485A-B [Form 225 Rev. 11/70]; CX 11A-B [Form F–19–135 Rev. 9/72]; *compare* CX 449A-B [Form F–19–135 Rev. 2/73], *with* CX 13A-B [Form F–19–135 Rev. 11/73]; CX 12A-B [Form F–21–316]; CX 14A-B [Form F–21–316]; CX 16A-B [Form F–21–317]; RIR 59–60)

22. CX 1A is a contract (termed Service Order) dated November 20, 1965, with a customer located in Louisville, Kentucky. The contract provides for a Control and Repair guarantee to be issued. The Annual Renewal Premium is specified as $17.00. This contract has the following provision:

In addition to the initial term specified in Paragraph 1 above, the Guaranty may, at the sole option of the undersigned, be renewed annually for *Lifetime* additional years by making payment of the Annual Renewal Premium on or before the renewal date of each subsequent year and Orkin agrees to reinspect the premises upon receipt of each Annual Renewal Premium Payment.

(The word Lifetime, above, was handwritten in a blank space provided in the contract.)

CX 2A is a contract (Service Order) dated November 30, 1966, with a customer located in Louisville, Kentucky. The contract provides for a Lifetime Control and Repair guarantee. The Annual Renewal Fee is specified as $18.00. The contract has the following provision:

The Guaranty checked above will be issued and delivered to the Purchaser upon completion of initial treatment. Guaranty will be effective as long as payment is made in accordance with the Terms and Conditions of this Service Order.

It is further agreed that Guaranty will provide for an initial term of:

12 months. ORKIN will reinspect the premises upon expiration of the initial term and upon receipt of the Annual Renewal Fee.

Guaranty at the sole option of the Purchaser may be renewed annually by making payment of the Annual [12] Renewal Fee on or before the renewal date of each subsequent year.

CX 3 is a contract (Service Order) dated March 23, 1968 with a customer located in Norfolk, Virginia. This contract provides for a Lifetime Control and Repair guarantee to be issued. The contract provides as follows:

ORKIN CONTINUOUS PROTECTION GUARANTY

Under Orkin's Continuous Protection Plan, the above named property will be reinspected in November 1968 upon prompt payment of $18.00 (plus tax where applicable), and annually thereafter in November upon payment of $18.00 (plus tax where applicable _____), beginning in 1969.

(The underlined portions above were handwritten.)

The contract also provided:

Guaranty will be effective so long as payment is made in accordance with the Terms and Conditions of this Service Order.

CX 400A is a contract with a Bethesda, Maryland, customer dated April, 1969, having basic terms identical to CX 3, above.

CX 414A is a contract dated February 5, 1972, with a customer located in Chesterfield, Missouri. This contract provides for a Lifetime Control and Repair guarantee and states as follows:

ORKIN CONTINUOUS PROTECTION GUARANTY

Orkin's Continuous Protection Guaranty will provide protection for the above named property including Annual Reinspections upon payment of the initial charges and an Annual Renewal Payment of $37.00 starting February 1973 and each February thereafter.

See also CX 421A, an October, 1972, contract with provisions similar to CX 414A, as does CX 439A, a May, 1972, contract with a customer located in Surfside, South Carolina.

CX 4A, a contract (Service Order) dated March 1969, with a customer located in Petersburg, Virginia, provides for a Lifetime Control and Repair guarantee. The Annual Renewal Fee is specified as $18.00. The contract further provides that:

ORKIN will, AT NO EXTRA COST, reinspect the premises annually during said initial term and upon receipt of the Renewal Fee thereafter. [13]

CX 6A, a contract (Service Order) dated September 25, 1968, with a Brownsville, Texas customer, provides for a Lifetime Control guarantee, and for an Orkin Continuous Protection Guarantee upon the payment of an annual fee of $20.00.

CX 7A, a contract (Service Order) dated March, 1968, with a W. Columbia, South Carolina customer, provides for a Lifetime Control and Repair guarantee upon payment of an annual renewal fee of $15.00.

CX 9A, a contract dated December 17, 1969, with a Tulsa, Oklahoma customer, provides for a Lifetime Control and Repair guarantee and an Orkin Continuous Protection Guarantee upon payment of an annual renewal fee of $30.00.

CX 10A, a blank contract bearing form number F–19–135 REV. 11/70 has provisions for Lifetime Control and for an ORKIN CONTINUOUS PROTECTION GUARANTEE "so long as payments are made in accordance with the Terms and Conditions of this Contract." CX 11, a blank contract bearing form number F–19–135 REV. 9/72 has provisions similar to the provisions of CX 10A.

CX 13 is a blank contract with a form revision date of 11/73, which provides for a Lifetime Control guarantee. The Orkin Continuous Protection Guarantee states that:

Its coverage, including annual reinspection, will be effective for a period of _____ years upon payment of the initial charges and thereafter for a period of _____ years, so long as renewal payments of _____ are made annually.

CX 205G is a contract (Service Order) dated March 10, 1969, with a customer located in St. Francisville, Louisiana, which provides for

a Lifetime Control guarantee and for an Orkin Continuous Protection Guarantee upon payment of $75.00 annually, to continue "so long as payments are made in accordance with the Terms and Conditions of this Service Order." CX 205R is a 1969 contract with a New Orleans, Louisiana, customer which is similar to CX 205G, with a renewal fee of $30 annually.

CX 205W is a contract dated July 3, 1974 with a customer named Percy Bullock located in St. Amant, Louisiana. It has the following provision:

ORKIN CONTINUOUS PROTECTION GUARANTEE

The guarantee checked above will be issued to the buyer upon completion of initial treatment. The Guarantee will cover the above named premises and will be subject to the General Terms and Conditions on the reverse side hereof. Its coverage, including annual reinspection, will be effective for a period of 2 years upon payment of the initial charges and thereafter for a period of [14] LIFE years, so long as renewal payments of $20 are made annually.

(The underlined words were handwritten.)

CX 205Z3 is a contract with the same customer as above, Percy Bullock, dated February 3, 1975. This contract, entered into *after* Orkin changed its guarantee provisions, has the following provision:

ORKIN CONTINUOUS PROTECTION GUARANTEE

The type Guarantee checked above will be issued to the Buyer upon completion of initial treatment. The Guarantee will cover the treated premises and will be subject to the General Terms and Conditions on the reverse side hereof. The Guarantee will be effective for a period of 2 years upon payment of the initial charges and thereafter for a period of *** Life years, so long as renewal payments are made annually. ORKIN guarantees that the first four renewal payments will be $35.00. Thereafter, ORKIN reserves the right to increase renewal payments by giving written notice to the Buyer in advance of the renewal date. During the effective period of the Guarantee, ORKIN will reinspect the premises at such time as ORKIN may deem necessary, or annually upon the Buyer's request. No failure on the part of the Buyer to request reinspection shall, in any way, affect the Buyer's rights under this contract. The Buyer agrees to make the premises available for reinspection.

(The underlined words were handwritten.)

23. CX 205U is a form letter which Orkin issued to a customer in New Orleans, Louisiana. The complete letter reads as follows:

TREATMENT AND CORRECTIVE MEASURES

Date: April 23, 1967

Re: Property Located at:
785 Brehm Pl.
New Orleans, La. 70121

The treatment and corrective measures necessary to assure you complete protection

are described in the detailed specifications which are keyed to the scale drawing on the following pages.

Upon completion of the work, and payment for our services in the amount of $163.00, you will receive ORKIN'S written $25,000.00 Lifetime Termite [15] Damage Guarantee. This guarantee is backed by our corporate assets of more than $50,000,000.00.

This sensational Guarantee provides for an annual reinspection to assure that termites do not return. As the owner of an Orkin-treated building, you may continue protection from year to year thus assuring virtually lifetime protection against reinfestation. In addition, your property is protected up to $25,000.00 against repairs required as a result of subsequent termite infestation in the treated areas.

The cost of Orkin's Lifetime Guarantee is modest - a nominal annual inspection renewal fee of only $22.00 relieves you of all further termite worries.

Similar letters are in the record. RX 31 is a letter dated September 26, 1968, concerning property located in Cayce, South Carolina; RX 30 is a letter dated January 3, 1970 concerning property located in Tucson, Arizona; RX 581F is a letter dated March 1, 1971 concerning property located in Bethesda, Maryland; and RX 561F is a letter dated October 27, 1971 concerning property located in Summerville, South Carolina.

24. In approximately May of 1974, Orkin began revising its termite contract form(s) by adding a term or provision that provided for an increase of annual fees that did not depend on whether the treated premises were structurally modified, altered or otherwise changed after the date of the initial treatment. (*See* CX 205Z3 quoted above.) The revised termite contract forms containing such a provision were first used in each of Orkin's sales districts on or about February 1, 1975. (RIR 20; Raymond Dep. pp. 54–57, 81 and Dep. Ex. 8; Rollins Dep. p. 51; RX 131A-B)

25. Prior to entering into pre-1975 contracts with customers, in all states in which Orkin operated its termite control services business, Orkin had entered into termite contracts that specifically provided for increases in annual renewal fees, which increases did not depend on whether the treated premises were structurally modified, altered, or otherwise changed after the date of initial treatment. (RIR 22; Russell Dep. pp. 35–38 and Dep. Ex. 8; F. 11)

26. The term "lifetime" in Orkin's pre-1975 contracts refers to the duration of the guarantee(s) given by Orkin in the particular contract involved, subject to and as limited by the terms and conditions thereof, including without limitation the obligation of the buyer to pay an annual renewal fee. Within this context, the term "lifetime" in the contracts refers to the lifetime of the premises initially treated under the contract involved as they structurally existed on the date of such

initial treatment. (RIR 5; Geiger Dep. pp. 15–17; Kimbell Dep. p. 130; **[16]** *see also* Nolen Aff. ¶ 5; Hromada Aff. ¶ 5) The guarantee was transferable to the new owner of the treated premises in the event the treated premises were sold. (Raymond Dep. Exs. 5, 6) Contrary to Orkin's interpretation that the "lifetime" guarantee referred to the lifetime of the treated premises, some state officials interpreted the term "lifetime" to refer to the lifetime of the homeowner who entered into the contract, or to the period the original homeowner held title to the original treated premises. (RX 201A, 208B, 211A)

27. During 1968, Orkin promoted its services for protection against termites in a promotion called "Orkin 12," developed by an outside advertising agency, Bearden & Associates. (Raymond Dep. pp. 44–47 and Dep. Ex. 6; Geiger Dep. pp. 28–29; RIR 49; RA 22) The Orkin 12 promotion was advertised in a pamphlet, on billboards, in magazines, and on radio and television. (RIR 51) Orkin spent approximately $1,-157,000 advertising Orkin 12. (RIR 50) The advertising program was discontinued before its slated expiration date because it failed to produce the hoped-for results. (Geiger Dep. pp. 29–30, 34–35)

28. The pamphlet concerning Orkin 12 was issued as point-of-sale material in presenting Orkin's services to its customers. (Raymond Dep. p. 46 and Dep. Ex. 6; Kimbell Dep. pp. 39–41 and Dep. Ex. 9) The pamphlet contained the following language as point 6 (hereinafter "point 6");

> LIFETIME GUARANTEE. Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

(Kimbell Dep. Ex. 9; Raymond Dep. Ex. 6) (emphasis in original)

29. The Orkin 12 promotion was used and advertised in each of the following states plus the District of Columbia during 1968: Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. (RA 23; CX 650K-L) The Orkin 12 program was utilized in varying degrees by Orkin's branch offices and sales personnel. (Goodman Aff. ¶¶ 4, 5; Bourgeois Dep. p. 8; Edwards Dep. pp. 12, 13; Jones Aff. ¶ 4)

30. Orkin promotional literature entitled *Facts You Should Know About Termites,* with a revision date of September, 1970, stated: **[17]**

Orkin Provides a
$100,000.00 Lifetime
Termite Repair
Guarantee

This guarantee provides for an annual reinspection to guard against new termite attack. As the owner of an Orkin-treated home, you may continue protection from year to year to assure virtual lifetime protection against reinfestation. Orkin's guarantee covers your home for $100,000.00 against repairs as a result of subsequent termite infestations. The cost of Orkin's "Lifetime Guarantee" is modest. Only a nominal annual fee relieves you of all future termite worries.

(CX 645A, Rev. 9/70)

31. Orkin's promotional literature with a revision date of November, 1970, stated:

Orkin guarantees effective pest control. Termite control services are backed by a special $100,000 guarantee.*

The phrase noted by the asterisk was:

Remains in effect for the lifetime of the property by payment of a low annual renewal fee.

(CX 648B, D)

32. In promotional literature with a revision date of March, 1971, Orkin represented that its $100,000.00 Lifetime Termite Repair Guarantee was "Another Orkin First." It stated:

Only Orkin, the world's largest in termite control, could make such a sensational termite Guarantee available to America's property owners.

This guarantee protects your property up to $100,000.00 against repairs which might be required as a result of subsequent termite infestations in the treated areas.

(CX 646F, G, Rev. 3/71)

33. Orkin's promotional literature with a revision date of February, 1973, stated:

Orkin offers much more for your investment and unmatched protection for your home. Our *guarantee* plan means *yearly checkups* by trained re- [18] inspectors. For pennies a day, it can be *renewed,* at your option, for the *lifetime* of your home and *retained* by the new owners if you move.

(CX 39R, T) (emphasis in original)

34. In a form letter with a revision date of September, 1973, Orkin stated:

We are pleased to render the following quotation to cover termite control (chemical soil treatment) for the above noted new construction:

* * * * * * *

Upon completion of the work as required Orkin Exterminating Company shall furnish the owners with a $100,000 termite damage guarantee, renewable annually for the life of the building.

(CX 35)

35. Orkin attempted to implement uniform sales techniques for its sales people. (Raymond Dep. pp. 26–41 and Dep. Ex. 1–5) It was Orkin's company policy that new salesmen should be given "Termite Sales Training Lessons 1–6." (Raymond Dep. p. 38 and Dep. Ex. 4) Complaint counsel contend Lesson #4 was dated 1972. (*See* Complaint Counsel's Answer and Reply Brief, p. 14 n. 8.) Lesson #5 has a copyright date 1973. (RX 677Z87) Termite Sales Training Lesson #4 contained the following:

HOW DOES THE CUSTOMER BENEFIT FROM ORKIN'S SUBTERRANEAN TERMITE TREATMENT?

A. They receive a lifetime guarantee protection which is non-cancellable by Orkin and renewable by customer's option.

B. Their cost of the renewal remains the same so long as renewal payments are made annually.

* * * * * * *

E. The guarantee is transferable if they sell their home.

(Raymond Dep. pp. 39–40 and Dep. Ex. 5) Termite Sales Training Lesson #4 also instructed branch salesmen that "(y)ou should always figure the price for Orkin Service by the Termite Pricing Schedule." (Raymond Dep. Ex. 5) The Orkin training programs apparently were not uniformly utilized throughout the company. (Jones Aff. ¶¶ 6, 7; Goodman Aff. ¶¶ 7, 8; Rollins Dep. pp. 10, 11, 20, 21) Some sales representatives were instructed to inform [**19**] prospective customers that the lifetime guarantee annual renewal fee was fixed and did so; others never received such instructions and did not so inform customers. (Goodman Aff. ¶ 9; Jones Aff. ¶ 8; Landry Dep. p. 63; Bourgeois Dep. p. 23; Edwards Dep. p. 30; Hoffman Dep. p. 29; Thompson Dep. pp. 20–21; Terrebonne Dep. pp. 20-21)

36. A pricing schedule with a revision date of October, 1971, for structures of conventional or slab construction, specified the following annual fees for new contracts depending on the price of the original job and the type of lifetime guarantee to be issued:

Original Job Price	Annual Fee For LR Guarantee	Annual Fee For LC Guarantee
$130	25.00	23.00
140	26.00	24.00
150	27.00	25.00
160	28.00	26.00
170	29.00	27.00
180	30.00	28.00
190	31.00	29.00
200	32.00	30.00
210	32.00	30.00
220	33.00	31.00
230	34.00	32.00
240	34.00	32.00
250	35.00	33.00
260	35.00	33.00
270	35.00	33.00
280	36.00	34.00
290	36.00	34.00
300	37.00	35.00
400	41.00	39.00 **[20]**
500	44.00	42.00

(CX 385C)

The pricing schedule states: "*Important* - You are selling a *non-cancelable,* lifetime guarantee." (CX 385C) (emphasis in original)

37. A pricing schedule with a revision date of May, 1973, for structures of conventional or slab construction, specified the following annual fees for new contracts depending on the price of the original job and the type of lifetime guarantee to be issued:

Original Job Price	Annual Fee For LR Guarantee	Annual Fee For LC Guarantee
$130	25.00	25.00
140	26.00	25.00
150	27.00	25.00
160	28.00	26.00
170	29.00	27.00
180	30.00	28.00
190	31.00	29.00
200	32.00	30.00
210	32.00	30.00
220	33.00	31.00
230	34.00	32.00
240	34.00	32.00
250	35.00	33.00
260	35.00	33.00
270	35.00	33.00
280	36.00	34.00
290	36.00	34.00
300	37.00	35.00
400	41.00	39.00 **[21]**
500	44.00	42.00

(CX 384A-B)

This pricing schedule also states: "*Important* - You are selling a *non-cancelable,* lifetime guarantee." (CX 384B) (emphasis in original)

38. In 1980, Gary W. Rollins, then President of Orkin, decided to increase the annual renewal fees of customers holding pre-1975 contracts and pre-1975 guarantees above the amount stated in the contracts and guarantees of those customers. (Rollins Dep. pp. 6, 12, 55–56, 73) Gary W. Rollins is currently President of Rollins, Inc. (Rollins Dep. p. 5)

39. Prior to increasing the annual renewal fees on pre-1975 contracts, Orkin requested that Arnall, Golden & Gregory, an Atlanta law firm, provide Orkin with a written legal opinion. The law firm prepared a legal opinion dated December 6, 1978. The opinion concluded that Orkin's pre-1975 contracts appear to be of an indefinite duration and, as such, are terminable after a reasonable period of time. (Rollins Dep. pp. 60–62; Schneider Dep. p. 64; RX 44A-F) James M. Schneider, General Counsel of Rollins, Inc., reviewed the opinion given by Arnall, Golden & Gregory, and confirmed to management the conclusion reached in that opinion. (Schneider Dep. p. 67; RX 170A-B) Mr. Gary Rollins reviewed these legal opinions prior to making his decision to increase the annual renewal fees for pre-1975 contracts. (Rollins Dep. pp. 60–64, 73, 80–81; RX 43A-G; RX 170A-B)

40. The legal opinion rendered by Arnall, Golden & Gregory as-

sumed as the issue to be considered: "Are there any grounds for the claim that a contract which may be renewed or extended from year to year, indefinitely, is unenforceable." The author of the opinion also stated: "I assume that the Orkin contract involves a right to *extend the term of the original contract* and here the issue would be two-fold: (1) possible failure as a perpetual contract and (2) possible failure for indefiniteness of terms." (RX 44A) (emphasis in original.)

41. At the time that James M. Schneider, General Counsel of Rollins, Inc., confirmed to management the conclusion reached by the law firm of Arnall, Golden & Gregory, Mr. Schneider was not aware of Orkin's sales literature statements; *i.e.*, the Orkin 12 promotion. Mr. Schneider was the person at Rollins, Inc., who had contact with the law firm of Arnall, Golden & Gregory and requested the legal opinion from the firm (Schneider Dep. pp. 62–63; Schneider Dep. [dated February 8, 1985] pp. 12, 22).

42. Between 1978 and 1980, Orkin undertook an extensive expense reduction program before deciding, in February 1980, to increase the annual renewal fees on pre-1975 contracts. Also, [**22**] during February 1980, Orkin increased by 40% the annual renewal fees on post-1975 customers whose contracts contained an express provision permitting such increases. (RX 46A-D; RX 42A-E)

43. Prior to making his decision to increase the annual renewal fees of customers holding pre-1975 contracts and pre-1975 guarantees, Gary Rollins presented a synopsis of issues (dated February 7, 1980) on the subject of the increase to R. Randall Rollins, who was then President of Rollins. (Rollins Dep. pp. 73-80, 85, 86 and Dep. Ex. 12) In part, the synopsis contained the following:

> Please find below and attached my analysis of the "pros and cons" regarding raising the renewal amount of our pre-1975 termite customers.
>
> PROS
>
> 1. Potential income increase of $2,286,614 (#232,969 accounts valued at $6,017,406 × 40% increase less 5% cancellations)
>
> CONS
>
> 1. A few customers advised by salesmen and literature that renewal amount would be fixed.
> 2. State regulatory agencies (Pest Control, Consumer Protection, etc.) could interpret our contract in some cases to imply the renewal amount is fixed. Those who obtain old proposal information will discover we put this in writing.
> 3. Our longer term employees might feel that we are going back on our word.
> 4. There could be customer lawsuits and complaints.
>
> OPTIONS
>
> 1. Leave as is.
> 2. Write customers and put on voluntary basis.

3. Meet with individual state regulatory and consumer groups to obtain understanding and raise.
4. Raise and handle exceptions.

(Rollins Dep. Ex. 12) [23]

44. Gary Rollins' recommendation to R. Randall Rollins, with which R. Randall Rollins concurred, was option 4 above, to raise the annual renewal fees and handle the exceptions. (Rollins Dep. pp. 73, 78–79)

45. Gary Rollins was aware of the Orkin 12 promotion at the time he wrote his synopsis to R. Randall Rollins. Literature containing point 6 of the Orkin 12 promotion was an attachment to Gary Rollins' synopsis to R. Randall Rollins. (Rollins Dep. pp. 76–80 and Dep. Ex. 12)

46. In 1980, Orkin sent notices to approximately 207,000 customers holding pre-1975 contracts or pre-1975 guarantees, that Orkin was increasing the annual renewal fees over the amount specified in those customers' contracts or guarantees. (RIR 23; Raymond Dep. pp. 224, 239 and Dep. Ex. 46) All customers were notified of the increase well prior to their respective renewal dates. (Raymond Dep. Ex. 16 [Beginning in August - October renewals]; RIR 25)

47. The notice of the increase of annual fees stated:

Dear Customer:

Thank you for being an Orkin customer and allowing us to protect your home against wood infesting organisms. We're sure you agree this protection is as important as homeowner and fire insurance, but it is much less expensive.

Through the past few years we have improved productivity to absorb our increased costs of gasoline, petroleum products, labor and increased government regulations. However, these increased operating expenses can no longer be totally absorbed while maintaining the high quality of service you deserve. Therefore, to maintain this quality protection, we now find it necessary to increase your annual renewal fee to the amount indicated on the enclosed Termite Renewal Invoice. We hope you understand we would not increase your renewal fee unless it was absolutely necessary.

Again, thank you for your patronage and understanding. Should you have a question concerning this matter, please contact your local branch manager as he can best assist you.

Sincerely,

/s/Ron Kimbell
Director of Customer Service [24]

(Raymond Dep. pp. 89, 94 and Dep. Ex. 16 [at A00974])

Ron Kimbell was never an officer of Orkin. (Kimbell Dep. p. 53)

48. Notices reflecting increased annual renewal fees were sent to customers holding pre-1975 contracts from Orkin's Home Office locat-

ed at 2170 Piedmont Road, N.E., Atlanta, Georgia, and were transmitted by regular mail, along with first renewal notices two months prior to the renewal date. (RIR 25) Orkin began sending the notices concerning the increase of annual fees in August, 1980, for customers whose renewal month was October, 1980. (Raymond Dep. pp. 89, 252–54 and Dep. Exs. 16, 49)

49. Customers holding pre-1975 contracts or pre-1975 guarantees to whom notices were sent were located in the following states:

Alaska	Mississippi
Alabama	Montana
Arkansas	Nebraska
Arizona	North Carolina
California	New Jersey
Colorado	New Mexico
Connecticut	New York
District of Columbia	Nevada
Delaware	Ohio
Florida	Oklahoma
Georgia	Pennsylvania
Iowa	Rhode Island
Illinois	South Carolina
Indiana	South Dakota
Kansas	Tennessee
Kentucky	Texas
Louisiana	Utah
Maryland	Virginia
Michigan	Wisconsin
Minnesota	West Virginia
Missouri	Wyoming

(RIR 26)

50. The annual fees for pre-1975 contracts were increased to a minimum of $25.00 or by 40%, whichever was greater. (Raymond Dep. pp. 89, 252–54 and Dep. Exs. 16, 49)

51. Orkin received communications from customers and customers' attorneys that expressed their belief that Orkin did not have the right to increase annual renewal fees for pre-1975 contracts. (Kimbell Dep. pp. 42–45 and Dep. Ex. 10; Raymond Dep. pp. 108–109; CX 291, 292A-B, 293, 294, 295A-B, 296A-B, 297–300, 302, 303A-C, 304–306, 307A-B, 308A-B, 309A-B) Orkin's records indicate that as of May, 1981, its Customer Service department had received complaints about the increase in the annual renewal [25] fees on its pre-1975 contracts from less than 2% of its affected customers. This may not be a complete total of complaints received by Orkin since those complaints received by the branch offices may not be included in this total. Additionally the total of 5700 customers who had their increased annual renewal

fees rolled back had to complain to receive any action. (F. 67, 58–60; RX 73; Rollins Dep. p. 119) Orkin has taken the position when customers have complained to it concerning the increase of annual fees for pre-1975 contracts that Orkin had a right to increase the annual renewal fee. (Rollins Dep. p. 148 and Dep. Ex. 31; F. 51–53; Raymond Dep. pp. 264–267 and Dep. Ex. 56)

52. Orkin had a policy of returning payments of customers who paid the amount specified in their contracts rather than the increased amount. (Kimbell Dep. pp. 68–69 and Dep. Ex. 14; Raymond Dep. p. 210; EX 288, 289B, 292A, 308A, 309B)

53. Concerning the increase of annual renewal fees for pre-1975 contracts, Ron Kimbell, Director of Rollins Customer Service, in a letter dated August 11, 1980, wrote to Gary Rollins that:

> Several of the customers' phone calls and letters implied some things that caused me to review the contracts used from 1968 to present. Some of the contracts said:
>
> . . . . including Annual Reinspections upon payment of the initial charges and Annual Renewal payment of $_____ starting _____ and each _____ thereafter.
>
> form 225 Rev. 11/70
> form F–19 135 Rev. 11/
>
> . . . . Its coverage, including annual reinspections will be effective for a period of ____ years upon payment of the initial charges and thereafter so long as renewal payments of $_____ are made annually. No form #, approximately 1974.
>
> . . . . will be reinspected in _____ upon payment of $_____ and annually thereafter in ____ upon payment of $_____ beginning in _____.
> Rev 3/68
>
> After reviewing these contracts (not the guarantees) I have concluded that the pre-1975 increase is more questionable than ever. Several of the statements are leaning more towards the implication of no increase ever, than a possible increase at a later date. Based upon my experience I would say the decision to increase these accounts (even though we [**26**] need the revenue) will lead us down a path quite unpopular with our customers, the media, and the consumer groups. Angry comments from several customers, one of which was an attorney leads me to conclude we could end up in court on this. One possibility this could lead to would be one "pioneer" taking us to court for all consumers that have been "damaged" by this action. I fully understand the reason and need for this increase, yet I request that this program be suspended immediately until such time as all parties involved (Legal, Public Relations, Customer Service, Orkin, Finance, etc.) can meet and discuss the repercussions of this program. I can support any program Orkin decides on, yet I feel we should all have a unified approach and understanding of this most delicate matter. May I hear from you?

(Kimbell, Dep. pp. 17, 42–46 and Dep. Ex. 10; Raymond Dep. p. 103 and Dep. Ex. 18) This letter was written at the time the increase in annual renewal fees on pre-1975 contracts was being implemented. (F. 46, 47, *supra*.)

54. John Raymond, Orkin's Director of Administrative Operations, has testified that "Ron Kimbell's job was to be like an ombudsman for the customer. His job was to make us aware of what the customers were saying, how they felt about things. He did his job very well." (Raymond Dep. p. 103) Mr. Kimbell's request for a suspension of the increase of annual renewal fees for pre-1975 customers was not granted. (Raymond Dep. pp. 103–104)

55. James M. Schneider, Rollins General Counsel, testified on February 8, 1985, that during the fall of 1978 he was shown an Orkin contract and asked whether there was a basis for increasing the renewal price. His reaction was stated as follows:

> Well, I looked at the contract, and I recall that my reaction was the reaction that—or my initial reaction was that of most people that reviewed the contract, I didn't see offhand a basis for increasing the prices. The provision concerning the renewal prices appeared to be of indefinite duration using words like "hereafter" or "thereafter," and my instant or immediate reaction was there simply was not a basis for increasing the prices.

(James M. Schneider Dep. p. 19)

56. Orkin used a form letter in responding to numerous customers who inquired about the increase of the annual renewal fee. The letter explained the rationale behind the increase. (Kimbell Dep. pp. 27–29, 65–72 and Dep. Exs. 6, 13–16; Rollins Dep. pp. 179–181 and Dep. Exs. 42–43; CX 264A-B, 266A-B, 267A-B, [**27**] 268A-B, 269A-B, 270A-B, 271A-B, 273A-B, 274A-B, 275A-B, 276A-B, 277A-B, 278A-B, 279A-B, 280A-B, 281A-B, 282A-B, 283A-B, 284A-B, 285A-B, 286A-B) In part, the form letter stated:

> While our contracts prior to 1975 did not specifically mention increases, we believe that following a reasonable term of absorbing losses due to the impact of inflation, this increase is both consistent with law and reasonable business standards.
>
> * * * * * * *
>
> we appreciate your concern and hope that you now understand our position and will submit your renewal payment to keep your coverage in force.

(Kimbell Dep. Ex. 6)

This form letter made no mention of exceptions being made to the increase of the annual renewal fees. (*Ibid.*)

57. John Raymond has been Orkin's Director of Administrative Operations since 1976. In that position he has been responsible for the administrative procedures used by Orkin, and for supervision of several departments, including Orkin's Policy and Procedures Department. (Raymond Dep. pp. 4–6) In a memorandum dated August 13, 1980, John Raymond wrote to Orkin's branch managers concerning the increase of annual renewal fees for pre-1975 contracts and the one

exception to the increase which customers could invoke. In part, he wrote:

If a customer tells you that our pre-1975 contract does not allow for an increase, you should explain that prior to the inflation spiral, practically no one had this provision in the contracts. Recent legal rulings interpret this as meaning that the renewal fee shall remain unchanged for a *reasonable period* which we interpret to be no more than five years.

* * * * * * *

If the customer states they have sales literature that specifically states there will not be an increase in the renewal fee, you should ask them to read the statement to you. Some customers sold between 1967 and 1968 were given a pamphlet that stated the renewal fee would never increase. This statement was in the "Orkin 12 Point Plan." The statement, point number 6 says:

6. *Lifetime Guarantee.* Orkin's lifetime termite protection plan includes annual [28] reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection is very modest and never increases. In case of a sale, the guarantee is transferable.

If any of your customers tell you they have a pamphlet in their possession that prohibits an increase you should ask them to read to you the exact wording. If the wording is not verbatum [sic] as stated in "point 6" above they are, in fact, eligible for an increase. If their material does have this statement, and you confirm it, then tell the customer a computer mistake was made and a corrected bill will be sent. Ask them not to pay until a correct bill is received.

(Raymond Dep. pp. 4–5, 105–107 and Dep. Ex. 19) (emphasis in original)

58. In a memorandum dated December 11, 1980, John Raymond wrote to branch managers that Orkin was willing to make further exceptions to the increase of annual renewal fees for pre-1975 contracts. In part, he wrote:

It is not our desire to stand in judgment of the motives and memories of our customers. While we believe most of our customers were little concerned with the modest price of the renewal at this earlier time, we are willing to maintain the old renewal price for customers who state that at the time of purchase they relied on either a sales presentation or they construed the specific wording of the contract to provide that the renewal price would not be increased. We believe we are going beyond the letter as well as the spirit of the law in this matter and are willing to make this commitment provided that this exception to the general price increase is not abused. . . .

* * * * * * *

We are willing to make exceptions to give certain customers the benefit of the doubt. While we intend to be flexible in our evaluations, you should be alert to any abuses, particularly where complaints from customers exceed 1% of the affected customer base. You should be sensitive to potential abuses and discuss the matter with your District Manager. This exception program should be [29] administered fairly and consistently in the interest of all our customers as well as the company.

(Rollins Dep. pp. 125–28 and Dep. Ex. 23)

59. Attached to Mr. Raymond's memorandum of December 11, 1980, were procedures for granting this exception to the increase of annual renewal fees. These procedures contained the following:

PROCEDURES FOR HANDLING - RENEWAL PRICE INCREASE EXCEPTIONS

1. The company will continue to bill for the renewal increase.

2. In the event of any complaints, the Branch will attempt to explain and justify this increase to our customers.

3. However, if a customer will not accept the rationale for the increase, we will honor their position and hold the renewal at the original rate, *provided* the customer will represent *in writing* his understanding at the time his or her contract was made. This is an exception and should be granted to those customers who bought our termite contract with the understanding that the renewal fee was set and not subject to change.

4. In such cases, the Branch Manager will advise the customer that their case will be reviewed as an exception, and will be submitted to the District Manager for consideration. Whether the inquiry is by phone or by letter, the attached Letter #1 should be prepared by the Branch (each letter to be neatly typed on your Branch Letterhead and signed by the Branch Manager) and sent to the customer. Please note that this letter requires a response from the customer stating that as a condition of sale, he or she believed that the renewal fee was not subject to change. Include a return envelope with your letter for the customer's convenience.

5. The Branch should forward all written customer responses to the District Manager. The District Manager should evaluate the reasonableness of the customer's position. Assuming the District Manager determines that the customer's position is correct, he will notify the Branch that the renewal price will be returned to the old amount. The Branch [30] will so advise the customer of the decision to maintain the old renewal price with attached Letter #2. . . .

(Rollins Dep. Ex. 23 [at A00075, A00077]) (emphasis in original)

The letters #1 and #2 referred to in the foregoing were as follows:

Letter #1

Dear Customer:

Thank you for your recent inquiry regarding our termite renewal price increase. We understand your feelings in this matter and as indicated below, we are willing to make exceptions for the benefit of our customers from the general price increase previously announced. Before we discuss such exceptions, please allow us the opportunity to further explain our position.

At Orkin, as everywhere else, inflation meets us at each turn. Over the years we have increased employee productivity and reduced expenses, yet the inflation rate has far overshadowed our own internal efforts in fighting inflation. In 1975, we clearly recognized the total effects inflation brings. Beginning in 1975 our service contracts clearly explained that the renewal fee could increase at some time in the future. Of course, this is directly related to the inflation spiral and no one knows when it will stop.

Prior to 1975, and even as early as the late 1960's, few people had any concern for inflation as we do now. In those times no one had automatic rate increase factored in their contracts. While our service contracts prior to 1975 did not specifically mention

price increases, we believe that, following a reasonable term, this increase is a fair and reasonable business practice. We further had our legal staff review this point and they believe we are on sound legal ground in requesting a price increase.

Since the late 1960's we have maintained the price line. Now, and only as a last resort, we decided to increase these accounts. However, the increased renewal will still not bring us even with inflation and is well below our current renewal charge. We certainly want to keep your business, and believe this increase is reasonable in the light of today's economic condition. **[31]**

As indicated above, we are willing to make certain exceptions. If (1) at the time you entered into your contract with Orkin you were advised by our sales representative that your renewal price could not be increased at any time in the future or (2) at the time of purchase you reached the same conclusion based on your reading of the materials supplied to you, Orkin will maintain for you the fixed renewal price. We are willing to take our customers at their word and are relying on their honesty. Kindly write and advise us as to whether you relied on either a statement by our sales representative or the contractual materials supplied to the affect [sic] that your renewal price would not be increased as a condition of entering into the contract with Orkin. Please address your letter to me. Your letters will receive prompt review and decision. It is important that you notify us in writing so that a request for exception can be evaluated and processed.

As our customer, we want to keep you satisfied. Please let us hear from you in this matter.

Sincerely,

Branch Manager

(Rollins Dep. Ex. 23 [at A00079])

Letter #2

Dear Customer:

Your letter regarding your renewal price increase has been carefully considered.

As we mentioned earlier, we feel that our contract gives Orkin the right to increase your renewal amount; however, we want to be fair. Because of the conditions in your case, we are willing to make an exception.

Your satisfaction as a customer is our most important concern, so we will maintain your renewal fee at the original rate. Enclosed is a corrected renewal statement for your payment. As soon as we receive your payment we will submit a change request to reduce your renewal fee to the original amount. In the meantime, if you receive a renewal statement at the higher amount, *please disregard.* **[32]**

We appreciate your business and we look forward to continuing to serve you.

Sincerely,

Branch Manager

(Rollins Dep. Ex. 23 [at A00080]) (emphasis in original)

60. In a memorandum dated April 28, 1981, Linda Morton, Orkin's

Manager of Policy and Procedure, wrote Orkin's branch, district and regional offices and stated, in part:

The increase of termite renewals for our older customers sold from January 1940 through December 1974 will end with the billing of our September renewal customers in July 1981.

Until then we will still need to address the problem of decreasing those customers who have a legitimate argument for not wanting to accept a price increase. The procedure for decreasing termite renewals was sent out by John Raymond - Orkin Operations - December 11, 1980.

The following procedure is a revision of that memo so please read it carefully. It is intended to simplify the process.

A. Please be sure to follow the procedure carefully in order to be sure that the customer's account in handled properly.

NOTE: This does not apply to contracts sold in 1975 or later. Beginning in 1975 our contract gave us the right to increase after five years. Those renewals are not to be decreased.

1. When the customer calls, determine the year of completion. If it is before 1975, attempt to explain and justify the increase to the customer.

2. If the customer strongly objects to the increase on the grounds that they were told at the time of sale that the renewal fee would never increase, explain that you will need to send them a letter from your Branch Manager and that you can decrease the renewal fee upon receipt of a written request from them.

(Raymond Dep. pp. 170–172 and Dep. Ex. 27; RIR 54, pp. 32–33) **[33]**

The letter from the branch manager referred to in point 2 above was identical to letter #1 (Rollins Dep. Ex. 23 at A00079) set forth in F. 59, *supra*. (*Compare* Raymond Dep. Ex. 27, letter #1 [at A05280], *with* letter #1, Rollins Dep. Ex. 23 [at A00079], as set forth in F. 59)

61. In a memorandum dated March 2, 1981, R. M. Russell, Vice-President of Government Relations for Orkin, suggested to Gary Rollins that customers whose contracts were entered into in 1968 should no longer be sent notices for increased annual renewal fees. In part, he wrote:

As we are now primarily through our renewal increase program, I think it might be to our advantage to consider dropping 1968 contracts towards renewal increase for the remainder of the program. This would give us some base to show our good intent in any future litigation regarding this program. Even if we do stop now, all months will have received two or more notices. In my opinion, the possible reduction in renewal collections would be worthwhile towards our future negotiations and possible litigation.

(Russell Dep. pp. 3–4, 75–78 and Dep. Ex. 17; *see also* Russell Dep. pp. 71–75 and Dep. Ex. 16)

62. From August 1981 through July 1982, Orkin rolled back the

increase of annual renewal fees of customers who had entered into their pre-1975 contracts in 1968. (Raymond Dep. pp. 180–184 and Dep. Ex. 32) Customers were notified of the rollback by an insert included in the renewal notice that was sent two months prior to the anniversary month of their contracts. Customers who had previously paid an increased rate were given credit for the amount of the increase. (Raymond Dep. Ex. 32) In part, the insert stated:

> Your annual renewal fee was increased last year for the first time since you contracted for Orkin's services in 1968. The justification for the increase was provided at that time.
>
> We have subsequently learned that a marketing program may have been used in your locality in 1968 which could have led you to believe that the amount of your termite renewal premium would never increase. We do not know whether you were aware of this program at the time you contracted for Orkin's services. However, we at Orkin believe that the simplest and fairest course is to maintain your renewal premium at the amount initially described in your contract. You are receiving with the current invoice, a credit equal to the increase [34] that was posted last year. Your next year's renewal will be at the original rate.

(*Ibid.*) The "marketing program" referred to in the insert discussed above was the "Orkin 12" promotion (Raymond Dep. p. 181), which was known to Orkin management at the time the decision to increase the annual renewal fees was made. (F. 45)

63. Approximately 15, 832 customers had their annual renewal fees returned to the level specified in their contracts because of the Orkin 12 promotion. (RIR 29b)

64. By May 25, 1981, Orkin had received payments of annual renewal fees of $1,257,629 in excess of the sum of the amounts specified in pre-1975 contracts of customers who paid their increased annual renewal fees. (Raymond Dep. pp. 216–224, 232–236 and Dep. Exs. 43, 44, 41 [at A00889] ["3. $ INCREASE PAID THROUGH 5/25/81 UPDATE $1,257,629])

65. By May 25, 1981, Orkin had received payments of annual renewal fees of $113,615 in excess of the sum of the amounts specified in pre-1975 contracts of customers who entered into their contracts in 1968 and who paid their annual renewal fee. (Raymond Dep. Ex. 44 [at A00175]) As of November, 1981, approximately 170,000 customers, or 82.1%, of pre-1975 customers had paid the increased price or the frozen price. Other statistics indicate that as high as 87% of such customers had paid. (Rollins Dep. Ex. 46) During its fiscal year ending on June 30, 1983, by June 20, 1983, Orkin had received payments of annual renewal fees of $959,158 in excess of the sum of the amounts specified in pre-1975 contracts of customers who paid their annual renewal fees. (CX 138P) Orkin has estimated its increased renewal

revenue through 1984 from its pre-1975 customers to be $7,515,764. (CX 195B)

66. By August 1, 1984, Orkin had approximately 164,402 customers with pre-1975 contracts or pre-1975 guarantees. (RA 20) Approximately 142,902 customers were paying increased fees as of this date (164,402 less 21,500). Orkin's cancellation rate on its termite contracts is normally 5.8% overall and 5.2% on contracts that have been in force over five years. (RX 40A) Orkin contends that its cancellation rate on its pre-1975 contracts following its 1980 increase in their annual renewal fees was approximately 5.0%. (RX 135S) However, this percentage is calculated by using only a five month period of cancellations whereas the denominator was the total of all renewals. The exhibit relied upon by Orkin shows that there were 10,739 cancellations during a five-month period, October, 1980 through February 1981. (RX 135S) This would be equivalent to a cancellation rate in excess of 12%. As of August 1, 1984, the actual cancellation rate of pre-1975 customers was approximately 5% per year (207,000 customers as of August 1980 less 164,402 customers as of August 1, 1984 equals 42,600 cancellations—42,600 divided by 207,000 equals 20.5%). **[35]**

67. By June of 1984, respondent had approximately 5700 customers with pre-1975 contracts or pre-1975 guarantees whose annual renewal fees had been rolled back to the amount indicated in their contract or guarantee, not including those customers who had entered into their pre-1975 contracts in 1968. (*See* F. 58–60; Respondent's Motion for Access, pp. 1–5 [filed June 28, 1984]; Raymond Dep. pp. 210–211, 105–108 and Dep. Exs. 19, 22) As of August 1984, a total of approximately 21,500 pre-1975 customers had their annual renewal fees returned to the amount specified in their contracts under Orkin's "accommodation" programs. (Childs' Aff. ¶ 8)

68. After Orkin had raised the annual renewal fees for pre-1975 contracts, Orkin considered making additional increases in the annual renewal fees of pre-1975 contracts. These latter increases did not occur. (Raymond Dep. pp. 187–192, 262–264 and Dep. Exs. 33, 34, 55; Rollins Dep. pp. 171–76 and Dep. Exs. 38, 39)

69. After Orkin had raised the annual renewal fees for pre-1975 contracts, Gary Rollins asked John Raymond to consider ways to convert pre-1975 customers to a new contract that would permit Orkin to raise the renewal fees again in the future. (Raymond Dep. pp. 239–240 and Dep. Ex. 46; Rollins Dep. pp. 197–201 and Dep. Ex. 46)

70. Orkin has comprehensive guidelines and procedures covering virtually every aspect and phase of its termite control services business. (RIR 46) Orkin's guidelines and standards for the quality of

services rendered under its termite guarantees have not differed depending on whether or not the consumer's termite contract was a pre-1975 contract. (RIR 46) Orkin has never considered a plan or proposal to reduce the quality of services rendered under its pre-1975 guarantees. (RIR 47; Rollins Dep. pp. 72–73; Raymond Dep. p. 121)

71. Concerning the feasibility of a pre-1975 customer switching to another termite control company for the same guarantee as Orkin provided, Gary Rollins testified as follows:

> Do you have an opinion as to the feasibility of a pre-1975 customer switching to another termite control company and that company providing the same guarantee as Orkin for the annual fee stated in the customer's Orkin guarantee?
>
> MR. STATON: The original annual fee?
> MS. ALPHIN: The original annual fee stated in the Orkin guarantee.
> THE WITNESS: I would doubt that. **[36]**
>
> BY MS. ALPHIN:
>
> Q. You would doubt that a company would do that for a customer; is that correct?
> A. That's right.

(Rollins Dep. p. 210)

72. According to the Consumer Price Index, between 1966 and 1980, the cumulative inflation rate was over 170%. (RX 686) Costs of providing termite protection services rose constantly between 1966 and 1980. (Hromada Aff. ¶ 6; Nolen Aff. ¶ 9) During the period June 30, 1975 to June 30, 1979, Orkin's termite related costs increased 48.4%. (RX 45A, 46A, 48B, 650C; Rollins Dep. p. 51) However, Orkin has continued to realize a profit on its renewal business. (RX 650C) Based on the costs of providing termite renewal service in 1984, if Orkin were required to roll back all its pre-1975 customers to their initial annual renewal price, Orkin would experience an average loss per pre-1975 account per year of $10.93. (RX 649) Based on the costs of providing termite renewal service in 1984, even with the increased annual renewal price, Orkin lost an average of $2.91 per pre-1975 contract. (RX 649) If inflation continues and Orkin is prohibited from increasing its annual renewal fees on pre-1975 contracts, its losses on these accounts will continue to increase. (Boudreaux Aff. ¶ 4) Orkin's pre-1975 customers represent approximately one-third of its termite control services customers, but account for only one-fourth of its termite renewal revenues. These proportions will drop naturally over the years through attrition. (RX 94C)

73. Officials of at least seventeen states have questioned the legality of Orkin's increase of the annual renewal fees for pre-1975 contracts and pre-1975 guarantees. These states are Arkansas, Arizona, California, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Mary-

land, Minnesota, Missouri, North Carolina, South Carolina, Texas, Virginia, and West Virginia. (RX 201A, 208B, 211A, 560, 579, 657A, 658, 659, 660A, 661A-E, 662A-C, 663A-C, 664, 665A-D, 666A-E, 667A-B, 668A-C, 669A-B, 670A-F; CX 200A, 203A-B, 228A-B, 248A-E, 388)

74. In a letter dated January 15, 1981, Roger W. Giles, Assistant Attorney General of Arkansas (CX 200A-B), wrote to Orkin:

The Arkansas State Plant Board has forwarded to this office information relating to several complaints against Orkin Exterminating Company as a result of the company's failure to comply with the terms of Orkin's Lifetime Guarantee. Several individuals have complained to the State Plant Board that Orkin has refused to accept the annual renewal fee stated in the Lifetime Guarantee [37] Contract and that the company has increased the annual fee, thereby breaching the original agreement.

In addition to these complaints, this office has also received information concerning your attempt to increase annual fees on Lifetime Guarantee Contracts in North Carolina and the correspondence with the North Carolina Attorney General's Office. This office is in agreement with their opinion that the Lifetime Guarantee Contracts are valid, and that any contract modification can only be accomplished with the consent of both parties.

Therefore, this office must insist that the contracts entered into with the residents of the State of Arkansas be performed in accordance with their original terms.

(CX 200A)

In a letter dated March 9, 1981, Mr. Giles wrote to Orkin:

This letter will confirm our phone conversation of this date in which Rollins Inc. and the Arkansas State Plant Board agreed as follows:

1. Orkin Lifetime Guarantee contracts entered into prior to 1975 which did not specifically state that the annual renewal would increase will continue to be serviced at the rate stated on the contract if a representation was made to the purchaser at the time of sale that the annual renewal fee would not be increased.
2. Any individual who did receive the representation can continue to receive service from Orkin at the same rate by furnishing Orkin with a signed statement so stating.

The Arkansas State Plant Board and this office will be advising everyone who has made an inquiry or who makes an inquiry in the future of this understanding with your Company.

(RX 658)

75. In a letter dated April 13, 1981, to Orkin, Annette M. Lassalle, Staff Attorney, Louisiana Department of Justice, stated, in part:

It is the opinion of this office that Orkin is bound by the renewal fees as stipulated in each client's contract. Hence, if any client has paid [38] a fee over that stipulated in his contract, he has overpaid and is due a refund by Orkin.

At this time we ask that you review your records and make the necessary adjustments or refunds to Louisiana clients.

(CX 203A)

76. Enclosed with Ms. Lassalle's letter of April 13, 1981, was a copy of Louisiana Attorney General's Opinion Number 81–03, which stated, in part:

The facts are as follows: Orkin has entered into a number of individual contracts with customers providing pest control service on an annual basis. These contracts stipulate that they may be renewed yearly for a renewal fee specified in each contract. Orkin now seeks to increase the stated renewal fee on the basis that their operating costs have increased. The contracts in question have absolutely no provisions for escalation of renewal fees.

Considering Louisiana Civil Code articles and case law, it is the opinion of this office that Orkin is bound by their stipulated contract renewal fee and may not escalate that rate in contracts which do not have a rate escalation clause.

(CX 203B)

77. The State of Louisiana has brought suit against Orkin as a result of Orkin's increasing the annual renewal fees of pre-1975 contracts. In part, the suit seeks reinstatement of the annual renewal fees stated in the contracts and refunds of annual renewal fees collected by Orkin from customers whose fees were in excess of those stated in their contracts. (CX 205A-Z16)

78. In a letter dated April 10, 1981, Jay Laurence Lenrow, Assistant Attorney General of the State of Maryland, wrote to James M. Schneider, General Counsel of Rollins (Schneider Dep. p. 4), about Orkin's obligations under its pre-1975 contracts. Mr. Lenrow wrote:

It is the opinion of this office that the contracts used by Orkin create a duty on the part of Orkin to renew its guaranty and inspect the home of any person tendering the pre-established Annual Renewal Fee.

* * * * * * *

[39]

This letter shall serve as notice pursuant to Md. Com. Law Code Ann. § 13–402 (1975) that the State of Maryland is offering your client the opportunity to conciliate this matter. Your failure to conciliate will force this office to seek injunctive and other relief pursuant to Md. Com. Law Code Ann. § 13–406 (1975).

(CX 211A-C)

In a letter dated May 18, 1981, John Henry Lewin, Jr., of Venable, Baetjer and Howard in Baltimore, wrote to Mr. Lenrow the following:

This will respond to your request for a statement of position by our client, Rollins Exterminating Co., known here as Orkin. . . .

The jurisdiction of the Attorney General is limited to those practices covered by the Consumer Protection Act, Md. Ann. Code, Com'l Law Art. § 13–101 *et seq.* This legislation was enacted in response to the "mounting concern over the increase of deceptive

practices in connection with sales of merchandise and services and the extension of credit." Section 13–102 (a). Further, the prohibited practices are defined as the "sale . . . of any consumer goods or consumer services;" and the "extension of consumer . . . credit . . . or the collection of consumer debts." Section 13–303. The unfair or deceptive trade practices, listed in some detail in § 13–301, enumerate those practices which would wrongfully induce a person to enter a contract—situations where, had the consumer known what the seller meant or intended, he would have had a different view of the deal.

In the Orkin situation, however, there has been no violation of the Act. There have been no unfair or deceptive trade practices. Orkin fully intended to provide exactly the services sold at the price stated at the time of entering the contract. Orkin in no way misled or deceived any customer. Both parties to each contract had exactly the same view of the agreement—annual service at a fixed price.

(CX 212A-C)

In a letter dated October 3, 1984, Roger C. Wolf, Special Assistant Attorney General of the State of Maryland, wrote to Mr. Christian Achstetter [apparently an Orkin customer]: **[40]**

The Federal Trade Commission has brought an action against Orkin and rather than duplicate efforts we are waiting the results of their action.

(CX 410)

79. In a letter dated October 23, 1980, Rebecca R. Bevacqua, Assistant Attorney General of the State of North Carolina, wrote to Mr. Schneider of Orkin that:

The contract between Orkin and Mr. Schrimper is one for a *Lifetime* Control and Repair Guaranty which calls for annual reinspections upon payment of a set fee. The contract is neither perpetual nor indefinite in duration, being clearly limited by the term "Lifetime." Thus, the general rules you cited regarding contracts of indefinite duration are inapplicable.

With regard to the fundamental equities involved, you have failed to take note of one very important consideration; Orkin used the set annual inspection fee as a key selling point for these pre-1974 contracts. The fact that they could continue to pay only $20 a year was a material consideration justifiably relied on by Mr. Schrimper and other pre-1974 customers when they chose to contract with Orkin. We think a court would find it highly inequitable for Orkin to now claim that the contract does not mean what it led customers to believe it meant at the time it was signed.

We are not unsympathetic with the problems your company faces as a result of inflation. However, the fact that a party to a contract later discovers he made a bad bargain has never been grounds for rescission of the contract or unilateral changing of its terms.

Therefore, our position in this matter is that Orkin cannot increase its renewal prices on pre-1974 contracts unless the increase is agreed to by the customer.

(CX 218A-B)

In a letter dated December 9, 1980, the Office of the North Carolina Attorney General wrote:

We agree that all pre-1974 [sic] customers who (whether because of the wording of their contracts, statements in other documents furnished to them by Orkin, or statements made by Orkin personnel) relied on the fact that their annual renewal fees [41] would remain set and who objected to the increase would be allowed to continue paying the renewal fee stipulated in their contract.

(RX 667A-B)

In a letter dated April 13, 1981, Alan S. Hirsch, Assistant Attorney General of the State of North Carolina, wrote to Jay Laurence Lenrow, Assistant Attorney General of the State of Maryland, which was carbon copied to James Schneider, Rollins' General Counsel:

This is in response to your letter of April 8, concerning Orkin Exterminating Company. Enclosed you will find two letters, one dated October 23 and the other December 9, 1980, concerning this matter. The first letter indicates our position in regard to the legal justification of increasing Orkin contract rates. The second letter indicates an enforcement decision on our part not to pursue the matter in regard to those individuals that do not affirmatively object to the increase in rates. That we have made this enforcement decision in no way changes our view that Orkin is probably required to live by the letter of those contracts.

I spoke to Jim Schneider of Orkin today and reaffirmed this position. I also informed Mr. Schneider that we in North Carolina reserved the right to reevaluate our enforcement decision should litigation in other states indicate our legal opinion is correct.

(CX 222, 351A-F)

In a letter dated April 14, 1981, James Schneider wrote to Alan Hirsch:

Thank you very much for giving me the courtesy of a telephone call yesterday concerning your communications with Mr. Lenrow of the Maryland Attorney General's Office. Frankly, I was extremely upset concerning Mr. Lenrow's comments that I had advised him that North Carolina had approved my legal interpretation concerning Orkin's pre-1975 contracts. As we discussed yesterday, this statement simply is not the least bit accurate, and I would not be so foolish as to misrepresent the same.

I am enclosing a copy of my letter to Mr. Lenrow dated April 3, 1981 which sets forth our accommodation program which was decided upon in concept prior to the written settlement with North [42] Carolina. As you will observe from the next to last paragraph, I am indicating that the modification has been accepted as a basis for resolving the issue with North Carolina as well as other jurisdictions. I am including a copy of a typical letter utilized with various jurisdictions to describe our modification program. I certainly hope that you will believe me when I say that at no time in the course of any communications, written or oral, with the State of Maryland or any other jurisdiction did I state that North Carolina or any other state had accepted our opinion as to the duration or meaning of Orkin's contracts.

(CX 220A-B)

80. In a letter dated January 27, 1981, the Office of Pima County (Arizona) Attorney, Consumer Protection-Economic Crime Division, wrote:

As your letter indicates that Orkin will treat its pre-1974 Arizona customers on the same basis as its North Carolina customers pursuant to an agreement with the Attorney General of the State of North Carolina, the above-referenced matter is deemed to have been settled in the public interest, and we will, therefore, close our file.

(RX 659)

81. In a letter dated December 11, 1980, Philip L. Fairbanks, Assistant Attorney General of the State of South Carolina, wrote Mr. Schneider that:

Simply stated, I believe the contracts we are concerned with are not perpetual. While the durational element is not fixed in terms of a particular number of years, it is clear that what the parties intended was a "lifetime guarantee," the lifetime being that of the home. This interpretation is borne out by explicit language contained in various of the documents involved. Given this conclusion, the case law relating to the enforceability of perpetual contracts is inapposite.

* * * * * * *

On the basis of the foregoing considerations, the position of this office is that Orkin's unilateral alteration of the price term in its Lifetime [43] Guarantee Contracts violates the South Carolina Unfair Practices Act.

(CX 228A-B)

82. In a letter dated February 24, 1981, George W. Stokes, Assistant Attorney General of the State of West Virginia, wrote Orkin that:

The Consumer Protection Division of the Attorney General's Office has under investigation your increase in annual inspection renewal fees under your termite agreements.

We have received complaints from different geographical areas of our State concerning your increase in such fees. The following allegations have been made against Orkin:

On or about May 6, 1968, you executed a "Termite Agreement" with one Mildred White, 1533 Smith Street, Milton, West Virginia 25541. The property was later acquired by Ernest R. Wheeler. The contract provided for "a nominal annual inspection fee of only $17.00." This fee was paid annually until the year 1981, at which time you increased the fee to $25.75.

On or about October 21, 1974, you executed a termite agreement with Mr. Frank Ruble, 816 Mulberry, Elizabeth, West Virginia 26143, which provided for an annual renewal fee of $30.00. This fee was paid each year. In the year 1981, you increased this annual fee to $43.26.

On or about October 10, 1974, you executed a termite agreement with Barry Wood, Post Office Box 53, Paw Paw, West Virginia 25434, which provided for an annual renewal fee of $41.00. This fee was paid until the year 1981. In the year 1981, you increased the annual fee to $57.68.

The above increases in annual renewal fees were made unilaterally by you and

contrary to the express written contract you had with the consumers. The law is well settled in the State of West Virginia that a written contract is not subject to unilateral modification.

The above allegations, if found to be credible, constitute an unfair method of competition and a deceptive act and practice which is unlawful under [44] the West Virginia Consumer Credit and Protection Act.

(CX 238A-B)

On October 20, 1981, Orkin entered into an "Assurance of Discontinuance" with the State of West Virginia which provided, *inter alia,* that Orkin will not increase the annual renewal fees of customers in West Virginia who (1) have objected to the increase on the basis that salesmen represented to the customers at the time the contract was executed that the annual renewal fee would not be increased during the life of the premises covered by the contract, and (2) all [objecting] customers who believed by reason of the contract and supporting documents that the annual renewal fee would not be increased for the lifetime of the premises covered by the contract. (RX 670A-F)

83. In a letter dated December 30, 1980, the Department of Health & Rehabilitative Services of the State of Florida wrote the following to Dudley J. Lamy (carbon copied to Orkin) concerning Mr. Lamy's complaint against Orkin:

This department takes the position that since your subterranean termite treatment contract makes no reference to any change in renewal fee, and contains no contract termination date, the ORKIN company cannot increase the fee. Chapter 10D–55.105(2) ". . . the contract shall clearly set forth the following information:

. . . (i) The total maximum price to be charged for treatment service, the exact annual renewal fees to be charged under the contract, if any . . ."

Chapter 10D–55.142(1)(b): "Each licensee shall comply with the terms of each pest control contract it ussues [sic]."

Therefore, your renewal fee, for the life of the contract, is $30.00, and cannot be raised as long as you keep the contract is force.

By copy of this letter we are advising the ORKIN Exterminating Company, Inc., that to raise renewal fees, full disclosure of this intention must be included in the contract at the time of its issuance.

(CX 388)

84. In a letter dated January 28, 1981, the Office of the Attorney General of the State of Minnesota wrote to Mrs. C.W. Tousley, the holder of an Orkin pre-1975 contract: [45]

Orkin has offered to honor its fixed 'life control' price, if a customer sends Orkin a letter indicating that at the time their services were sold, the sales people represented the renewal price would *not* be increased. The contact person at Orkin is James

Schneider, General Counsel, P. O. Box 647, Atlanta, Georgia 30301, telephone (404)873–2355.

(RX 665D) (emphasis in original)

85. In a letter dated July 9, 1981, the Office of the Attorney General of the State of Missouri wrote:

According to prior correspondence that our office had with you, concerning a complaint registered by Mr. and Mrs. Johnny E. Russell, it was our understanding that you would maintain the constant renewal rate for those customers who indicated that they contracted for Orkin's services on the basis of a fixed renewal price.

(RX 666B)

86. Six states, Arkansas, Arizona, Minnesota, Missouri, North Carolina, and West Virginia, have indicated an acceptance of some form of accommodation for those Orkin customers who have complained about the increase in annual renewal fees on pre-1975 contracts to either Orkin or to state officials. (RX 658, 659, 665D, 666A-E, 667A-B, 670A-F) The North Carolina settlement with Orkin also was accepted by Arizona and Missouri. The North Carolina settlement provided as follows:

(1) "Customers who objected to the increase" includes those who registered a complaint with our office, those who contacted the Rollins or Orkin offices in Atlanta by phone or mail to object, those who wrote or called one of the Orkin branch offices in North Carolina, and those who refused to send the amount listed on the renewal notice but mailed in a check for the amount they had paid in the past and which was set forth in their pre-1974 contract.

(2) Our office will furnish you with a current list of all individuals who have complained to us, and either you or the Customer Service Department in Atlanta will contact them and resolve their complaints forthwith.

(3) The Customer Service Department in Atlanta has records showing what individuals registered a complaint directly with the home office in Atlanta [**46**] and will contact these persons regarding their objections.

(4) The branch office managers in North Carolina will be advised as to the agreed-upon resolution and will contact those customers who registered their objections at the local level.

(5) Orkin will furnish some written assurance to those customers whose renewal fees are to be held at the price stated in their pre-1974 contracts that no additional increase will be attempted.

(RX 667A-B)

II. Conclusions

A. *Summary Of The Facts*

(1) Description of Orkin and its Customer Contracts and Guarantees

The complaint in this matter was issued on May 8, 1984. It charged that Orkin Exterminating Company, Inc. ("Orkin"), in advertising, promoting, selling, and performing its termite-control services to consumers, agreed for the life of the consumer's structure, to reinspect the structure annually and, if necessary, to either retreat, or retreat and repair the structure, provided the consumer paid a specified annual renewal fee. In contradiction of these agreements, beginning in 1980 and continuing to the present, Orkin has raised, or attempted to raise, the agreed-upon annual renewal fees for its termite-control services. (Complaint ¶¶ 4, 5) These actions by Orkin are alleged to have caused substantial and ongoing injury to Orkin's customers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. As such, Orkin's acts and practices are alleged to constitute unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. (Complaint ¶¶ 6, 7)

Orkin has denied these allegations in its answer to the complaint filed June 18, 1984, and has asserted numerous defenses, including that the Commission lacks subject matter jurisdiction over the complaint allegations, that the acts and practices complained of have not caused substantial and ongoing injury to Orkin's customers, that the alleged unlawful acts and practices have been encouraged, approved, and/or compelled by state and federal regulatory authorities and are therefore exempt from the Federal Trade Commission Act, and that the consumers [47] alleged to have been injured have recognized, accepted, and acquiesced to the alleged unlawful conduct under doctrines of waiver, estoppel, ratification, accord and satisfaction, limitations and latches. Orkin further contends that the relief proposed in the complaint is inappropriate, not in the public interest, and is not or would not be authorized by law.

Complaint counsel has now filed a motion for summary decision. Orkin has responded to complaint counsel's motion and has filed a motion for summary decision in its favor. Orkin also has submitted statements of material fact which Orkin contends either directly contravene complaint counsel's findings of fact or raise genuine issues of inference and legal significance that foreclose any entry of summary decision in favor of complaint counsel.

To the extent that there are factual disputes in this record, they

relate to peripheral matters not necessary to a determination of the material issues to be decided in this matter. It is concluded, therefore, that there is no genuine dispute as to any material fact in issue and that it is appropriate to issue an initial decision based on the record as it has been submitted by the parties in their motions seeking summary decision.

Orkin provides pest-control and exterminating services throughout the United States, but mostly in the Southeast. In 1980, Orkin served customers located in 47 states and the District of Columbia. (CX 142C) As of September 1, 1980, Orkin operated approximately 294 branch offices and 44 district offices. (F. 2) Orkin is stated to be the world's largest termite and pest-control company, and has admitted that the acts and practices alleged in the complaint are in or affecting commerce. (F. 3, 4)

Orkin has entered into written agreements with its customers concerning the rendering of services to destroy or protect against termites, other wood-infesting organisms, moisture and wood decay. Under certain conditions Orkin has issued guarantees of its services. Only an officer of Orkin is authorized to change or vary the written terms of the pre-printed contracts and guarantees. (F. 8, 9, 10, 21) In general, prior to 1966, Orkin used pre-printed form contracts, and offered termite guarantees at a fixed price for continued protection to the treated property for a specified period which lasted from five to fifteen years. On or about January 1, 1966, Orkin began using the term "lifetime" in its termite contracts and/or termite guarantees. Earl F. Geiger, Vice Chairman of the Board of Rollins, Inc., who was Executive Vice-President of Orkin from 1964 to January 1976, introduced the "lifetime" guarantee concept to Orkin and proposed its adoption. (F. 11) [48]

Termite guarantees issued by Orkin include (1) a lifetime retreatment guarantee (LC Guarantee), (2) a lifetime retreatment and repair guarantee (LR Guarantee), (3) and a lifetime guarantee on pretreatment work on new construction (PR Guarantee). (F. 13)

The lifetime retreatment guarantee provides in part that at no extra cost to the customer Orkin will apply any necessary treatment to the premises if infestation occurs during the duration of the guarantee. The lifetime retreatment and repair guarantee provides in part that at no extra cost to the customer, Orkin will make repairs (up to a stated dollar maximum) to the structure and its contents in order to remedy any new damage caused by subterranean termites, provided that it is established that the new damage occurred after the initial treatment, and that at the time of discovery of the new damage, the damaged areas are infested with live subterranean termites. (F. 14, 15)

The lifetime guarantee on pretreatment work is the same as the LR Guarantee, except that Orkin's pretreatment guarantee is for new construction and its LR Guarantee covers existing structures. (F. 17) Generally, prior to 1969, Orkin's LR guarantees had a liability limitation of $25,000. In 1969, Orkin adopted a policy of issuing LR guarantees with a liability limitation of $100,000. (F. 16)

Orkin's termite contracts and termite guarantees provide for annual fees to be paid in order to continue the protection that is guaranteed. If the customer abides by the contract, and pays Orkin the specified annual renewal fee, the guarantee is to remain in effect. (F. 18) Orkin's termite contracts and termite guarantees, including those entered into prior to February 1, 1975, that used the term "lifetime", had a "structural modification" clause providing that in the event the premises were structurally modified, altered or otherwise changed after the date of initial treatment, the agreement would terminate unless a prior written agreement was entered into by the purchaser for Orkin to reinspect the premises, provide additional treatment, and/or adjust the annual renewal fee. (F. 19) Before February 1, 1975, Orkin's termite contracts and termite guarantees that included the term "lifetime" did not mention adjustments or increases of the specified annual renewal fee necessary to continue the lifetime guarantees issued with respect to those contracts, absent the treated premises being structurally modified, altered, or otherwise changed after the date of initial treatment. (F. 20)

In approximately May of 1974, Orkin began revising its termite contract form(s) by adding a term or provision that provided for an increase of annual renewal fees that did not depend on whether the treated premises were structurally modified, altered or otherwise changed after the date of the initial treatment. The revised termite contract forms containing such a provision were first used in each of Orkin's sales districts on or about February 1, 1975. (F. 24) [49]

Thus, Orkin's contracts can be divided into three general categories which are relevant to this proceeding. Prior to 1966, Orkin utilized contracts and guarantees that provided for a guarantee for a fixed term of years, five to fifteen years, provided the customer paid the annual renewal fee specified in the contract. From 1966 to February 1, 1975, Orkin utilized the lifetime protection guarantee which provided for lifetime protection for the designated premises upon the payment by the customer of a specified annual renewal fee. These contracts did not provide for an increase in the annual renewal fee absent modification or structural change in the designated premises. Subsequent to February 1975, Orkin utilized contracts which provided that the specified annual renewal fee could be increased after a five-year period. (RX 40A) This proceeding is concerned with those

customer contracts and guarantees entered into during the period 1966-February 1, 1975 ("pre–1975 contracts" and "pre–1975 guarantees"), and Orkin's increase in the specified annual renewal fees in those contracts commencing August, 1980. (*See* discussion *infra.*)

(2) The Increase in Pre–1975 Annual Renewal Fees

In 1980, Gary W. Rollins, then President of Orkin, decided to increase the annual renewal fees of customers holding pre–1975 contracts and pre–1975 guarantees above the amount stated in the contracts and guarantees of those customers. (F. 38) Prior to increasing the annual renewal fees on pre–1975 contracts, Orkin requested that Arnall, Golden & Gregory, an Atlanta law firm, provide a legal opinion as to whether such an increase was permitted under the terms of the contracts. On or about December 13, 1978, Arnall, Golden & Gregory provided Orkin with a written legal opinion that its pre–1975 contracts appear to be of an indefinite duration and, as such, are terminable after a reasonable period of time. (F. 39) James M. Schneider, General Counsel of Rollins, Inc., reviewed the opinion given by Arnall, Golden & Gregory, and confirmed to management the conclusion reached therein. (F. 41) Mr. Gary Rollins reviewed the legal opinions prior to making his decision to increase the annual renewal fees for pre–1975 contracts. (F. 39)

Between 1978 and 1980, Orkin undertook an extensive expense reduction program before deciding, in February 1980, to increase the annual renewal fees on pre–1975 contracts. Also, during February 1980, Orkin increased by 40% the annual renewal fees for post–1975 customers whose contracts contained an express provision permitting such increases. (F. 42)

Prior to making his decision to increase the annual renewal fees of customers holding pre–1975 contracts and pre–1975 guarantees, Gary Rollins presented a synopsis of issues (dated February 7, 1980) on the subject of the increase to R. Randall [**50**] Rollins, who was then President of Rollins, Inc. In part, the synopsis states:

Please find below and attached my analysis of the "pros and cons" regarding raising the renewal amount of our pre–1975 termite customers.

PROS

1. Potential income increase of $2,286,614 (#232,969 accounts valued at $6,017,406 × 40% increase less 5% cancellations)

CONS

1. A few customers advised by salesmen and literature that renewal amount would be fixed.

2. State regulatory agencies (Pest Control, Consumer Protection, etc.) could interpret our contract in some cases to imply the renewal amount is fixed. Those who obtain old proposal information will discover we put this in writing.

3. Our longer term employees might feel that we are going back on our word.
4. There could be customer lawsuits and complaints.

OPTIONS

1. Leave as is.
2. Write customers and put on voluntary basis.
3. Meet with individual state regulatory and consumer groups to obtain understanding and raise.
4. Raise and handle exceptions.

(F. 43) Gary Rollins' recommendation to R. Randall Rollins, with which R. Randall Rollins concurred, was option 4 above, to raise the annual fees and handle the exceptions. (F. 44)

Beginning in August, 1980, Orkin began sending notices to approximately 207,000 customers holding pre–1975 contracts or pre–1975 guarantees, that Orkin was increasing the annual renewal fees over the amount specified in those customers' contracts or guarantees. All customers were notified of the increase well prior to their respective renewal dates. The notice of the increase of annual fees stated, in part: **[51]**

Dear Customer:

* * * * * * *

Through the past few years we have improved productivity to absorb our increased costs of gasoline, petroleum products, labor and increased government regulations. However, these increased operating expenses can no longer be totally absorbed while maintaining the high quality of service you deserve. Therefore, to maintain this quality protection, we now find it necessary to increase your annual renewal fee to the amount indicated on the enclosed Termite Renewal Invoice. We hope you understand we would not increase your renewal fee unless it was absolutely necessary.

* * * * * * *

Sincerely,

/s/

Ron Kimbell
Director of Customer Service

(F. 46, 47) The annual renewal fees for pre–1975 contracts were increased to a minimum of $25.00 or by 40%, whichever was greater. (F. 50)

Orkin received communications from customers and customers' attorneys expressing their belief that Orkin did not have the right to increase annual renewal fees for pre–1975 contracts. Orkin has taken the position when customers have complained to it concerning the increase that Orkin had a right to increase the annual renewal fee, and Orkin had a policy of returning payments of customers who paid

the amount specified in their contracts rather than the increased amount. (F. 51, 52)

Orkin used a form letter in responding to numerous customers who inquired about the increase of the annual renewal fees. The letter explained the rationale behind the increase. In part, the form letter stated:

> While our contracts prior to 1975 did not specifically mention increases, we believe that following a reasonable term of absorbing losses due to the impact of inflation, this increase is both consistent with law and reasonable business standards.
>
> * * * * * * *
>
> [52]
>
> We appreciate your concern and hope that you now understand our position and will submit your renewal payment to keep your coverage in force.

(F. 56) This form letter made no mention of exceptions being made to the increase of the annual renewal fees. (*See* F. 56)

(3) Exceptions to the Pre–1975 Annual Renewal Fee Increase

During 1968, Orkin promoted its services for protection against termites in a promotion called "Orkin 12." The Orkin 12 promotion was advertised in a pamphlet, on billboards, in magazines, and on radio and television. Orkin spent approximately $1,157,000 advertising Orkin 12. (F. 27)

The pamphlet concerning the Orkin 12 promotion was issued as point-of-sale material in presenting Orkin's services to its customers. The pamphlet contained the following language as point 6 (hereinafter "point 6"):

> LIFETIME GUARANTEE Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

(emphasis in original) (F. 28)

The Orkin 12 promotion was used and advertised in each of the following states plus the District of Columbia during 1968: Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Mississippi, Nebraska, North Carolina, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin, and West Virginia. The Orkin 12 program was utilized in varying degrees by Orkin's branch offices and sales personnel. (F. 29) Literature containing point 6 of the Orkin

12 promotion was an attachment to Gary Rollins' synopsis to R. Randall Rollins, discussed above. Thus, Gary Rollins was aware of the Orkin 12 promotion at the time he wrote his synopsis to R. Randall Rollins. (F. 45)

On August 13, 1980, John Raymond, Orkin's Director of Administrative Operations, wrote to Orkin's branch managers concerning the increase of annual renewal fees for pre–1975 [**53**] contracts and the one exception to the increase which customers could invoke. In part, he wrote:

If a customer tells you that our pre–1975 contract does not allow for an increase, you should explain that prior to the inflation spiral, practically no one had this provision in the contracts. Recent legal rulings interpret this as meaning that the renewal fee shall remain unchanged for a *reasonable period* which we interpret to be no more than five years.

* * * * * * *

If the customer states they have sales literature that specifically states there will not be an increase in the renewal fee, you should ask them to read the statement to you. Some customers sold between 1967 and 1968 were given a pamphlet that stated the renewal fee would never increase. This statement was in the "Orkin 12 Point Plan." The statement, point number 6 says:

6. *Lifetime Guarantee.* Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection is very modest and never increases. In case of a sale, the guarantee is transferable.

If any of your customers tell you they have a pamphlet in their possession that prohibits an increase you should ask them to read to you the exact wording. If the wording is not verbatum [sic] as stated in "point 6" above they are, in fact, eligible for an increase. If their material does have this statement, and you confirm it, then tell the customer a computer mistake was made and a corrected bill will be sent. Ask them not to pay until a correct bill is received.

(emphasis in original) (F. 57)

In a memorandum dated December 11, 1980, John Raymond wrote to branch managers that Orkin was willing to make a further exception to the increase of annual renewal fees for pre–1975 contracts. In part, he wrote: [**54**]

It is not our desire to stand in judgment of the motives and memories of our customers. While we believe most of our customers were little concerned with the modest price of the renewal at this earlier time, we are willing to maintain the old renewal price for customers who state that at the time of purchase they relied on either a sales presentation or they construed the specific wording of the contract to provide that the renewal price would not be increased. We believe we are going beyond the letter as well as the spirit of the law in this matter and are willing to make this commitment provided that this exception to the general price increase is not abused. . . .

* * * * * * *

We are willing to make exceptions to give certain customers the benefit of the doubt. While we intend to be flexible in our evaluations, you should be alert to any abuses, particularly where complaints from customers exceed 1% of the affected customer base. You should be sensitive to potential abuses and discuss the matter with your District Manager. This exception program should be administered fairly and consistently in the interest of all our customers as well as the company.

(F. 58)

Attached to Mr. Raymond's memorandum of December 11, 1980, were procedures for granting an exception to the increase of annual renewal fees. The procedures, in part, were:

PROCEDURES FOR HANDLING - RENEWAL PRICE INCREASE EXCEPTIONS

1. The company will continue to bill for the renewal increase.

2. In the event of any complaints, the Branch will attempt to explain and justify this increase to our customers.

3. However, if a customer will not accept the rationale for the increase, we will honor their position and hold the renewal at the original rate, *provided* the customer will represent *in writing* his understanding at the time his or her contract was made. This is an exception and should be granted to those customers who bought our termite contract with **[55]** the understanding that the renewal fee was set and not subject to change.

(emphasis in original) (F. 59)

In a memorandum dated April 28, 1981, Linda Morton, Orkin's Manager of Policy and Procedure, wrote Orkin's branch, district and regional offices and stated, in part:

The increase of termite renewals for our older customers sold from January 1940 through December 1974 will end with the billing of our September renewal customers in July 1981.

Until then we will still need to address the problem of decreasing those customers who have a legitimate argument for not wanting to accept a price increase. The procedure for decreasing termite renewals was sent out by John Raymond - Orkin Operations - December 11, 1980 [referred to above].

The following procedure is a revision of that memo so please read it carefully. It is intended to simplify the process.

A. Please be sure to follow the procedure carefully in order to be sure that the customer's account is handled properly.

NOTE: This does not apply to contracts sold in 1975 or later. Beginning in 1975 our contract gave us the right to increase after five years. Those renewals are not to be decreased.

1. When the customer calls, determine the year of completion. If it is before 1975, attempt to explain and justify the increase to the customer.

2. If the customer strongly objects to the increase on the grounds that they were told

at the time of sale that the renewal fee would never increase, explain that you will need to send them a letter from your Branch Manager and that you can decrease the renewal fee upon receipt of a written request from them.

(F. 60) [**56**]

In a memorandum dated March 2, 1981, R. M. Russell, Vice-President of Government Relations for Orkin, suggested to Gary Rollins that customers whose contracts were entered into in 1968 should no longer be sent notices for increased annual renewal fees. In part, he wrote:

As we are now primarily through our renewal increase program, I think it might be to our advantage to consider dropping 1968 contracts towards renewal increase for the remainder of the program. This would give us some base to show our good intent in any future litigation regarding this program. Even if we do stop now, all months will have received two or more notices. In my opinion, the possible reduction in renewal collections would be worthwhile towards our future negotiations and possible litigation.

(F. 61)

From August 1981 through July 1982, Orkin rolled back the increase of annual renewal fees of all customers who had entered into their pre–1975 contracts in 1968. Customers were notified of the rollback by an insert included in the renewal notice that was sent two months prior to the anniversary month of their contracts. Customers who had paid an increased rate during the previous year were given credit for the amount of the increase. (F. 62) Customers who qualified under Orkin's further exception to the fee increase also had their annual renewal fees rolled back. The record is silent as to whether this latter group of customers received credit for any increased fees they may have paid.

(4) Results of the Increase in Pre–1975 Annual Renewal Fees

By May 25, 1981, Orkin had received payments of annual renewal fees of $1,257,629 in excess of the sum of the amounts specified in pre–1975 contracts of customers who paid their increased annual renewal fees. (F. 64) As of that date Orkin had received payments of annual renewal fees of $113,615 in excess of the sum of the amounts specified in pre–1975 contracts of customers who entered into their contracts in 1968 and who paid their annual renewal fee. As of November, 1981, approximately 170,000 customers, or 82.1%, of pre–1975 customers had paid the increased price or the frozen price. Other statistics indicated that as high as 87% of such customers had paid. During its fiscal year ending on June 30, 1983, by June 20, 1983, Orkin had received payments of annual renewal fees of $959,158 in excess of the sum of the amounts specified in pre–1975 contracts of custom-

ers who paid their annual fees. Through 1984, Orkin has estimated that it received $7,515,764 from the increase in pre–1975 customers' annual renewal fees. (F. 65) [57]

Approximately 15,832 customers had their annual renewal fees returned to the level specified in their contracts because of the Orkin 12 promotion. (F. 63) Approximately 5,700 other pre–1975 customers had their annual renewal fees rolled back in accordance with Orkin's accommodation program. Thus, as of August, 1984, a total of approximately 21,500 pre–1975 customers had their annual renewal fees rolled back to the original renewal fee specified in their contracts. (F. 67)

By August 1, 1984, Orkin had approximately 164,402 customers with pre–1975 contracts and pre–1975 guarantees, of which 142,908 were paying the increased fee. (F. 66) Approximately 80% of the pre–1975 customers were making annual renewal fee payments as of August 1, 1984. Orkin's cancellation rate on its termite contracts is normally 5.8% overall and 5.2% on contracts that have been in force over five years. (RX 40A) Orkin had cancellations on its pre–1975 contracts following its 1980 annual renewal fee increase of 10,739 through the renewal months of October 1980 through February 1981. (RX 135S) Extrapolated over the entire year would give Orkin a cancellation rate on pre–1975 contracts in excess of 12% during this first year of the fee increase. However, over a four-year period, 1981–1984, the cancellation rate approximated 5% per year. (F. 66)

According to the Consumer Price Index, between 1966 and 1980, the cumulative inflation rate was over 170%. (RX 686) Costs of providing termite protection services rose constantly between 1966 and 1980. During the period June 30, 1975 to June 30, 1979, Orkin's termite renewal costs increased 48.4%. Based on the costs of providing termite renewal service in 1984, if Orkin were required to roll back all its pre–1975 customers to their initial annual renewal fee, Orkin would experience an average loss per pre–1975 account per year of $10.93. Based on the costs of providing termite renewal service in 1984, even with the increased annual renewal fee, Orkin lost an average of $2.91 per pre–1975 contract. If inflation continues and Orkin is prohibited from increasing its annual renewal fees on pre–1975 contracts, its losses per pre–1975 customer will continue to increase. Orkin's pre–1975 customers represent approximately one-third of its termite control services customers, but account for only one-fourth of its termite renewal revenues. This proportion will drop naturally over the years through normal attrition. (F. 72)

B. *Orkin's Contract Terms*

Commencing in 1966 and continuing through February 1, 1975, Orkin adopted a lifetime guarantee plan in connection with its sales of termite control services. The guarantee provided in the contracts would remain in effect for the lifetime of the treated premises so long as the customer paid a specified annual [**58**] renewal fee. These lifetime guarantees were designed to offer consumers additional services over existing contracts which limited the guarantee to terms of 5 to 15 years if the customer paid the annual renewal fee. (F. 12) These "pre–1975 contracts" offered lifetime guarantees and were silent as to any increase in annual renewal fees, with one exception. If the treated premises were modified or structurally changed, the contract would terminate unless a prior written agreement were entered into providing for a reinspection of the premises by Orkin and an adjustment in the annual renewal fee.

Numerous copies of Orkin's contracts are in the record. The terms and conditions of several of these contracts have been set forth in the Findings of Fact. (*See* F. 22) Examples of these terms and conditions include:

CX 3, a contract dated March 23, 1968, offers a "Lifetime Control and Repair (LR)" guarantee, and has the following statement:

ORKIN CONTINUOUS PROTECTION GUARANTY

Under Orkin's Continuous Protection Plan, the above named property will be reinspected in November 1968 upon prompt payment of $18.00 (plus tax where applicable $_____), and annually thereafter in November upon payment of $18.00 (plus tax where applicable $_____), beginning in 1969.

RX 571A, a contract dated March 11, 1971, offers a "Lifetime Control (LC)" guarantee, and has the following statement:

ORKIN CONTINUOUS PROTECTION GUARANTY

Under Orkin's Continuous Protection Plan, the above named property will be reinspected in Mar. 72 upon payment of Paid (plus tax where applicable $_____), and annually thereafter in Mar. upon payment of $35.00 (plus tax where applicable $_____) beginning in 1974.

CX 414A, a contract dated February 5, 1972, offers a "Lifetime Control and Repair (LR)" guarantee, and has the following statement:

ORKIN CONTINUOUS PROTECTION GUARANTY

Orkin's Continuous Protection Guaranty will provide protection for the above named property including Annual Reinspections upon payment of the initial charges and an Annual Renewal Payment of $37.00 starting February 1973 and each February thereafter. [**59**]

(*See also* CX 421A, [contract dated October 1972]; CX 439A [contract dated May 1972]; RX 562A [contract dated October 1971]; all which have terms identical to those of CX 414A, set forth above.)

CX 205W, a contract dated July 3, 1974, offers a "Lifetime Control (LC)" guarantee, and has the following provision:

ORKIN CONTINUOUS PROTECTION GUARANTEE

The guarantee checked above will be issued to the buyer upon completion of initial treatment. The Guarantee will cover the above named premises and will be subject to the General Terms and Conditions on the reverse side hereof. Its coverage, including annual reinspection, will be effective for a period of 2 years upon payment of the initial charges and thereafter for a period of LIFE years, so long as renewal payments of $20 are made annually.

(The underlined words were handwritten.)

The only logical interpretation of this plain language in the Orkin "pre–1975" contracts is that Orkin has contracted to provide lifetime protection for the treated premises for a fixed annual renewal fee. As long as the customer paid the specified annual renewal fee, the guarantee would continue, absent modification or structural changes in the premises.[2] The words [**60**] used in the contracts are words that Orkin itself originated, and they must be given their customary and usual meaning, unless it is shown that the parties used them in a different sense. 17A C.J.S., Contracts Section 301. The contracts use ordinary English words, not technical or scientific words, and it is not necessary to have extrinsic evidence as to their meaning. *Restatement (Second) Contracts*, 1979, Section 212, Comment d. The interpretation and construction of contracts or agreements is within the province of the administrative law judge and the Commission. *See Amrep Corp.*,

[2] Ron Kimbell, Director of Rollins Customer Service, in a letter dated August 11, 1980, wrote to Gary Rollins concerning customer complaints about the annual renewal fee increase:

> Several of the customers' phone calls and letters implied some things that caused me to review the contracts used from 1968 to present.
>
> * * * * * * *
>
> After reviewing these contracts (not the guarantees) I have concluded that the pre–1975 increase is more questionable than ever. Several of the statements are leaning more towards the implication of no increase ever, than a possible increase at a later date.

(F. 53)

James M. Schneider, Rollins General Counsel, testified on February 8, 1985, that during the fall of 1978 he was shown an Orkin contract and asked whether there was a basis for increasing the renewal price. His reaction was:

> Well, I looked at the contract, and I recall that my reaction was the reaction that—or my initial reaction was that of most people that reviewed the contract, I didn't see offhand a basis for increasing the prices. The provision concerning the renewal prices appeared to be of indefinite duration using words like "hereafter" or "thereafter," and my instant or immediate reaction was there simply was not a basis for increasing the prices.

(F. 55)

102 F.T.C. 1362, 1663–64 (1983); *Horizon Corp.*, 97 F.T.C. 464, 842–846 (1981).

Respondent Orkin has admitted that the term "lifetime" as used in its contracts and guarantees is for the lifetime of the treated premises. It is admitted that the contracts contain a specified annual renewal fee in order to maintain the lifetime guarantee in effect, and that there is no provision for an increase in the annual renewal fee, absent structural modification or change. Thus, the Orkin contracts provide a lifetime guarantee at a set annual renewal fee. The contracts are neither indefinite nor perpetual, being clearly limited by the term "lifetime."

Orkin contends that the term "lifetime," as used in its pre–1975 contracts, does not refer to the time that the annual renewal fee will be maintained at any particular level. (Resp. Brief, p. 43) By this argument Orkin is attempting to separate the analysis to be given the contract. The contract must be interpreted as a whole; it offers lifetime protection at a stated annual fee. *See Restatement (Second) of Contracts* Section 202(2); *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 860–61 (Utah 1978). Orkin also argues that no one at Orkin who participated in the decision to offer a "lifetime" guarantee on its pre–1975 contracts intended that the initially stated annual renewal fee would never be increased for the lifetime of the contracts (Resp. **[61]** F. 13, 14),[3] that its sales personnel were never instructed by anyone at Orkin that the annual renewal fees on its pre–1975 contracts were fixed, that they were never instructed to make such representations to customers, and that they never made such representations to customers. (Resp. F. 13, 14, 29, 30)

The interpretation to be given Orkin's contracts raises a question of law, not fact. While the plain language of the contracts does not require extrinsic evidence of the intention of the parties to the contract, the record presents undisputed evidence of Orkin's interpretation of its contracts at the time they were being utilized.

The Orkin 12 promotion is compelling evidence that Orkin intended the contracts to provide for a lifetime guarantee at a fixed annual renewal fee. The Orkin 12 advertising campaign was directed at a lifetime fixed annual renewal fee. The point-of-sale pamphlet stated:

> LIFETIME GUARANTEE. Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

[3] "[T]he intention of a party that is relevant to formulation of a contract is the intention manifested by him rather than any different undisclosed intention." Restatement (Second) of Contracts Section 200 Comment B.

(Kimbell Dep. Ex. 9; Raymond Dep. Ex. 6) (emphasis in original)

Orkin attempted to implement uniform sales techniques for its sales people. (Raymond Dep. pp. 26–41 and Ex. 1–5) It was Orkin's company policy that new salesmen should be given "Termite Sales Training Lessons 1–6."[4] (Raymond Dep. p. 38 and Ex. 4) Termite Sales Training Lesson #4 contained the following:

HOW DOES THE CUSTOMER BENEFIT FROM ORKIN'S SUBTERRANEAN TERMITE TREATMENT?

A. They receive a lifetime guarantee protection which is non-cancellable by Orkin and renewable by customer's option. [62]

B. Their cost of the renewal remains the same so long as renewal payments are made annually.

* * * * * * *

E. The guarantee is transferable if they sell their home.

(Raymond Dep. pp. 39–40 and Dep. Ex. 5) Termite Sales Training Lesson #4 also instructed branch salesmen that "(y)ou should always figure the price for Orkin Service by the Termite Pricing Schedule." (Raymond Dep. Ex. 5) Two pricing schedules to be used by Orkin salesmen in pricing annual renewal fees have the following statement:

Important - You are selling a *non-cancelable*, lifetime guarantee. (CX 384B, 385C) (emphasis in originals)

These pricing schedules have revision dates of October, 1971, and May, 1973.

Form letters issued by Orkin to customers reflect Orkin's interpretation of its contracts and guarantees, and the representations made to consumers. CX 205U is a form letter dated April 23, 1967, issued to a customer located in New Orleans, Louisiana. RX 30 is a form letter dated January 3, 1970, issued to a customer located in Tucson, Arizona. RX 31 is a form letter dated September 26, 1968, issued to a customer located in Cayce, South Carolina. RX 561F is a form letter dated October 27, 1971, issued to a customer located in Summerville, South Carolina. RX 581F is a form letter dated March 1, 1971, issued to a customer located in Bethesda, Maryland. RX 30 has a form revision date of February 1969; RX 561F has a form revision date of January 1970. These form letters state, in part:

As the owner of an Orkin-treated building, you may continue protection from year to year thus assuring virtually lifetime protection against reinfestation. . . .

[4] "Termite Sales Training Lessons 1–6" apparently were in use as late as 1973. (*See* F. 35)

* * * * * * *

The cost of Orkin's Lifetime Guarantee is modest - a nominal annual inspection fee of only $31.00 relieves you of all further termite worries.

(RX 30, *see also* CX 205U, RX 31, 561F, 581F; F. 23)

Significantly, when Gary Rollins made his recommendation to R. Randall Rollins to increase the annual renewal fees for all pre–1975 contracts, he specifically noted that "a few customers" were advised by salesmen and literature "that the renewal amount would be fixed." He stated that "those who obtain old proposal [**63**] information will discover we put this in writing." He also stated that "our longer term employees might feel that we are going back on our word." (F. 43)

Based on the plain language of the Orkin pre–1975 contracts and the undisputed evidence set forth above, it is concluded that the annual renewal fees were fixed for the lifetime of the treated premises, that Orkin intended that the annual renewal fees be fixed, and that such representations were made to customers through advertising and by sales representatives. This conclusion is buttressed by the fact that Orkin rolled back the annual renewal fee increases for all 1968 customers based on the Orkin 12 promotion. (F. 62) Another 5700 pre–1975 customers convinced Orkin to roll back their annual renewal fee increase based on their understanding of the contracts and the representations made by sales representatives. (F. 67) Testimony also has confirmed that customers believed, or were told, that the annual renewal fee was fixed. (*See* Bourgeois Dep. p. 23; Edwards Dep. p. 30; Landry Dep. p. 63; Hoffman Dep. p. 29; Thompson Dep. pp. 20–21; Terrebonne Dep. pp. 19–20.)

Orkin's contention that the pre–1975 contracts are of an indefinite duration and terminable after a reasonable time (Resp. Brief, p. 45) is unpersuasive. Orkin's contracts must be read in their entirety to determine if there is any ambiguity. The contracts speak in terms of the treated property. The type of guarantee to be issued is "Lifetime." The contracts provide that:

ORKIN CONTINUOUS PROTECTION GUARANTY

Under Orkin's Continuous Protection Plan, the above named property will be inspected in Nov. 68 upon payment of $_____ (plus tax where applicable $_____), and annually thereafter in Nov., upon payment of $ 15.00 (plus tax where applicable $_____), beginning in 1969.

(CX 429A)

The contract also states:

The Guaranty checked above [Lifetime Control and Repair (LR)] will be issued and delivered to the purchaser upon completion of initial treatment. Guaranty will be

effective so long as payment is made in accordance with the Terms and Conditions of this Service Order.

(CX 429A)

Under the language of the contracts, quote sic above, the duration of the guarantee is fixed; it is the lifetime of the treated property. Orkin, one party to the relevant contracts, [**64**] has admitted that the lifetime of the treated property is the interpretation to be given the duration of its contracts (*see* Resp. F. 6, 7), and complaint counsel agrees with this interpretation. The lifetime guarantee is to continue "so long as payment is made in accordance with the Terms and Conditions" of the contract.

Words which fix an ascertainable fact or event, by which the term of a contract's duration can be determined, make the contract definite and certain in that particular.[5] 17 Am. Jur. 2d, Contracts Section 80 The payment of an annual renewal fee is a condition precedent to continuation of the contract. Payment of the annual fee obligates Orkin to perform according to the terms of the contract, which is to provide lifetime protection against termite infestation to the *designated property*. This is not only the interpretation which Orkin gives its contracts, but it is obviously the manifest intent of the parties to the contracts. Any interpretation of the term "lifetime" to be anything less than the lifetime of the treated property would be an injustice to the plain meaning of the word and the intent of the parties expressed within the four corners of the contract.

The mere fact that an obligation under a contract may continue for a very long time is no reason in itself for declaring the contract to exist in perpetuity or for giving it a construction which would do violence to the expressed intent of the parties. Where it appears that the parties did in fact intend that the obligation terminate at an ascertainable time, the courts, in effect, will supply the missing clause and construe the contract accordingly. *Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.*, 178 F.Supp. 655, 661 (S.D.N.Y. 1959), *aff'd per curiam* 280 F.2d 197 (2nd Cir. 1960) The lifetime of the treated structure is sufficiently definite to be enforceable.

It is concluded that the Orkin contracts can be renewed annually at the option of the owner of the treated premises for the life of the treated premises upon payment of the fixed annual renewal fee stated in the contracts. [**65**]

[5] To the extent there is any ambiguity in the meaning of the contracts, the ambiguity must be resolved against Orkin, who prepared the form contracts. Restatement (Second) Contracts Section 206; A. Corbin, Corbin on Contracts, 527 (One Volume Edition 1952). This is especially true in the case of Orkin, which had earlier utilized contracts which did provide for a definite number of years—five to fifteen—for its guarantee to continue. (F. 11) Adopting the term "Lifetime" and omitting the definite number of years previously used in its contracts, indicates Orkin's intentions were to offer a lifetime guarantee.

C. *Orkin's Acts and Practices Violate Section 5*

(1) Breach of Contract Can Constitute a Violation of Section 5

Orkin asserts that a non-deceptive breach of contract does not violate Section 5 of the FTC Act and that this proceeding constitutes the first attempt by the Commission to apply Section 5 to such a practice.[6] This unprecedented attempt to extend the scope of Section 5 is wholly unauthorized and improper, according to Orkin. Orkin relies on several decisions involving interpretations of "little FTC Acts" by the courts; namely, *United Roasters, Inc. v. Colgate-Palmolive Co.,* 649 F.2d 985 (4th Cir. 1981); *Stearns v. Genrad Inc.,* 1984–2 Trade Cas. ¶ 66,294 at 67,266, 67,270; *CF Industries, Inc. v. Continental Gas Pipe Line Corp.,* 448 F.Supp. 475, 485 (W.D.N.C. 1978); *Coble v. Richardson Corp. of Greensboro,* 322 S.E.2d 817 (N.C.App. 1984), interpreting the North Carolina Unfair Trade Practice Act, N.C. Gen. Stat. Section 75–1.1(a)(1981); and *Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.,* No. 83–1422 (1st Cir. Jan. 28, 1985), interpreting the Massachusetts statute, Mass. Gen. Laws ch. 93A.

The North Carolina Unfair Trade Practice Act tracks the language of Section 5 of the FTC Act, and the North Carolina courts look to the decisions of the Commission and the federal courts under Section 5 in interpreting the North Carolina statute. The Massachusetts statute provides that the courts in construing the state statute are to be guided by the decisions of the Federal Trade Commission and the federal courts in construing the FTC Act. Mass. Gen. Laws ch 93A Section 2(b) However, the reverse is not true, the Commission does not look to the interpretation of state statutes in interpreting its organic Act. Indeed, the Commission can find a practice unfair even where it is authorized under state law. *Spiegel, Inc. v. FTC,* 540 F.2d 287, 292 (7th Cir. 1976). In *Peerless Products v. FTC,* 284 F.2d 825, 827 (7th Cir. 1960), *cert. denied,* 365 U.S. 843 (1961), the court held:

> Unless Congress specifically withdraws authority in particular areas, the Commission, upon its general grant of authority under 15 U.S.C.A. § 45(a)(6), [66] can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is authorized by state law.

The North Carolina courts, the Massachusetts courts, and federal courts reviewing cases under the "little FTC" statutes, have held that mere breaches of contract, without more, do not violate the respective

[6] There have been numerous Commission proceedings where breach of contract has been held to be unfair, but usually in the context of other challenged practices. *See Jay Norris Corp.,* 91 F.T.C. 751, 848 (1978), *aff'd,* 598 F.2d 1244 (2d Cir. 1979), *cert. denied,* 444 U.S. 980 (1979) (failure to consistently meet guarantee claims of prompt delivery as well as money back guarantees); *Skylark Originals, Inc.,* 80 F.T.C. 337, 350 (1972), *aff'd,* 475 F.2d 1396 (3rd Cir. 1973) (failure to promptly honor money back guarantee as represented in advertisements and catalogs).

state statutes. In *State ex rel. Edminsten v. J.C. Penney Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977), the North Carolina Supreme Court held that the North Carolina statute is directed only at the sale of products, and the debt collection practices which were challenged in the proceeding followed a sale and were not part of a sale, and not within the statute.[7] In a later case, *Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980), the court broadened its interpretation of the statute to include a contract between a mortgage broker and a borrower. In *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), the court repeatedly described the statute as a protection for consumers.

In *Coble v. Richardson Corp. of Greensboro, supra*, a purchaser brought suit against a real estate development company for damages resulting from breach of warranty and unfair and deceptive trade practices in connection with the sale of a single-family residence. The purchaser was awarded compensatory damages, but the North Carolina Court of Appeals refused to award treble damages under the North Carolina Unfair Trade Practice Act. The court, in rejecting a claim of unfairness, used language somewhat similar to the language of the *Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction*, letter to Senators Wendell H. Ford and John C. Danforth, dated December 17, 1980. The court, in *Coble*, stated:

> Although unfair conduct that is neither deceptive nor fraudulent may constitute an unfair trade practice, the evidence at bar did not rise to the level of unfairness as that concept has been defined by our courts. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980). "[A] party is guilty of an unfair act or practice when it engages in conduct that amounts to an inequitable assertion of its power or position." *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 [67] N.C.App. 695, 700, 303 S.E.2d 565, 569, *cert denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).
>
> The case before us involves a breach of contract based on written warranties and oral representations that were essentially restatements of what defendant was already bound to do under the warranty. There is nothing so oppressive or overreaching about defendant's behavior in breaching the contract that would transform the case into one for an unfair trade practice.

The federal courts give credence to the North Carolina courts' interpretation of their own statute. In *CF Industries v. Transcontinental Gas Pipe Line Corp.*, 448 F.Supp. 475 (W.D.N.C. 1978), the district court considered the *J.C. Penney* decision, referenced the dissent in the case, and concluded that under *J.C. Penney*, the statute provided a remedy where a contract is *obtained* as a result of a violation of the statute, but no remedy where the violation is unrelated to the con-

[7] There was a strong dissent in the case stating that the majority decision read "unfair" out of the statute.

tract's formation. The court stated, in respect to the breach of contract:

> Whatever may be the case generally, the court concluded that on the mere allegation of deliberate or intentional refusal to procure and deliver natural gas, without any suggestion of deception or any claim of injury to competition, plaintiffs have not stated a claim under [the N.C. "little FTC Act"]. 448 F.Supp. at 485

In *United Roasters v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), the Fourth Circuit Court of Appeals considered an intentional breach of a contract, and concluded:

> Remaining to be determined, however, is whether Colgate's acts were unfair or deceptive within the meaning of § 75–1.1. It is clear that the statute encompasses such things as misrepresentation and a wide variety of shady practices sometimes associated with the marketing of consumer goods and services. Whatever the limit of their reach, however, the words must mean something more than an ordinary contract breach.
>
> In a sense, unfairness inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted but this is why remedial damages are awarded on contract claims. If such an award is to be trebled, the North Carolina legislature must have intended that substantial aggravating circumstances be present.
>
> * * * * * * *
>
> [68]
>
> The contract here was carefully negotiated and drawn by sophisticated parties. There is no hint of any unfairness to either party before Colgate's cessation of performance. It then broke the contract, but we cannot conclude that unfairness inhered in the circumstances of the breach within the meaning of the statute simply because the breach was intentional and not promptly disclosed.

In a very recent decision, the Fourth Circuit, in *Stearns v. Genrad, Inc.*, 1984–2 Trade Cas. ¶ 66,294 at 67,266 (4th Cir. Nov. 20, 1984), held:

> The statute has been construed as directed against deception in connection with the sale of goods. *Id.* at 67,269
>
> Even if there had been an intentional breach of the distribution contract by Genrad, that would not have been a violation of the North Carolina statute. *Id.* at 67,270

Thus, the present interpretation of the North Carolina "little FTC Act" is that an intentional breach of a contract, *without more,* is not actionable under that statute.[8] However, the interpretation of the North Carolina statute offers little guidance as to the interpretation

[8] Massachusetts courts have reached similar conclusions. *Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, No. 83–1422 (1st Cir. Jan. 28, 1985, slip op. at 10) These state precedents, involving as they do the breach of a single consumer contract, or a breach of contract between two commercial enterprises, offer no assurance as to how the state statutes would be construed where the breach of contract affects the rights of hundreds of consumers.

to be given the FTC Act. The North Carolina statute differs in a substantial way from the FTC Act; the North Carolina statute grants standing to sue under Section 75–1.1 to individuals, firms and corporations, and also provides for treble damages where a violation has been found. *Marshall v. Miller,* 302 N.C. 539, 276 S.E.2d 397, 402 (1981). Interpretations of the two statutes differ substantially; for example, debt collection practices, held not to be within the scope of the North Carolina statute, *J.C. Penney, supra,* have long been held to be within the ambit of Section 5. *See Floersheim v. FTC,* 411 F.2d 874 (9th Cir. 1969); *Spiegel v. FTC,* 540 F.2d 287 (1976); *Capax, Inc.,* 91 F.T.C. 1048 (1978). The FTC Act applies broadly to deceptive acts and practices and to unfair acts and practices; it is in no way limited to practices connected directly to the sale of products, the interpretation given the North Carolina statute. **[69]**

Orkin's reliance on state court decisions has little relevance in this proceeding, and in no event do state court decisions foreclose a contrary FTC Section 5 decision.[9] *FTC v. Sperry & Hutchison Co.,* 405 U.S. 233, 239 n. 4. Thus, Orkin's breach of contract must be measured against the Commission's policy on unfairness, not court interpretations of state statutes.

The Commission has stated:

> Unjustified consumer injury is the primary focus of the FTC Act, and the most important of the three *S&H* criteria. By itself it can be sufficient to warrant a finding of unfairness.

Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, p. 5 ("Unfairness Statement").

In *International Harvester,* the Commission set forth three tests for determining whether consumer injury is legally unfair. It must be:

> (1) substantial; (2) not outweighed by any offsetting consumer or competitive benefits that the practice produces; and (3) one which consumers could not reasonably have avoided.

International Harvester Co., 3 Trade Reg. Rep. (CCH) ¶ 22,217 at 23,181 (December 21, 1984).

If Orkin's acts and practices violate Commission policy on unfairness, a violation of Section 5 has been established.

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[9] There are two state proceedings against Orkin arising out of facts similar to the facts in this proceeding. *Orkin Exterminating Company v. Dept. of Health and Rehab. Services,* Case No. 81–389 (Fla.Cir.Ct. October 21, 1981), *aff'd per curiam* (Fla.Dist.Ct.App. 1982). (Orkin enjoined from raising renewal fees for customers holding form contracts in stipulated record—CX 248A-E), and *State of Louisiana v. Orkin Exterminating Co.,* Case No. 83–2166 (Dist. Ct. for the Parish of Orleans) (Pending) (CX 205A–Z16).

(2) The Injury to Consumers was Substantial

Beginning in August, 1980, Orkin increased the annual renewal fees of its pre–1975 customers by 40% or to a minimum of $25.00, whichever was greater. The price increase notice was sent to approximately 207,000 customers. (F. 46) Approximately 21,500 pre–1975 customers had their renewal fees rolled back to [**70**] the original contract level under programs initiated by Orkin after the fee increase had become effective. (F. 67) As of August 1, 1984, Orkin had approximately 142,902 customers with pre–1975 contracts whose annual renewal fees had been increased. (F. 66) By May 25, 1981 Orkin had received $1,257,629 in annual renewal fees in excess of the sums of the amounts specified in the pre–1975 contracts which were renewed. (F. 64) Orkin has estimated that its increased renewal revenue through 1984 from the fee increase to its pre–1975 customers will be $7,515,764. (F. 65)

The injury sustained by individual customers over the years has been and will continue to be substantial. While each customer's increase in the annual renewal fee may have been small, the customer is faced with paying this increased amount each year to retain the guaranteed protection. The Commission has stated that an injury may be substantial if it does a small harm to a large number of people. Further, Orkin has considered ways to increase the annual renewal fee again. (F. 68–69) Such action would heighten consumer injury. Under these criteria, the injury caused by Orkin's breach of its pre–1975 contracts is substantial.

(3) Consumers could not Reasonably have Avoided Injury

All of Orkin's pre–1975 contracts were preprinted forms. Orkin sales personnel did not have the authority to vary or change the forms. (F. 10) The contracts provided that payment of the annual renewal fee specified in the contract would continue the protection for the lifetime of the treated property. The form contracts did not state that Orkin reserved the right to raise the annual renewal fee. In fact, Orkin promoted its lifetime guarantees as having a fixed annual renewal fee. Since Orkin's customers could not have foreseen that Orkin would increase the annual renewal fee at some future date, they could not have reasonably avoided the injury. When Orkin sent the notice of the increase in annual renewal fees to its pre–1975 customers, the customers had no choice in the matter other than to pay the increased fee, or lose the guaranteed protection.[10] If the cus-

[10] Private legal action "may be too expensive to be practicable for individual consumers to pursue." *See* "Unfairness Statement," p. 7 n. 19.

tomer paid the fee specified in the customer's contract, Orkin returned the payment.

Although Orkin has made exceptions to the increase of annual renewal fees for some of its customers, the exceptions have not ameliorated the injury to the vast majority of the affected customers. As a general matter, Orkin did not inform its customers that any exceptions to the increase would be made. The notice Orkin sent to customers informing the customers [71] of the fee increase made no mention of exceptions. (F. 47) Mr. Raymond's memorandum of August 13, 1980, to branch offices instructed that if a customer complained that Orkin did not have the right to raise the annual fee, Orkin personnel were to attempt to justify the increase by explaining Orkin's interpretation of the contracts. (F. 57) A form letter sent by Orkin to numerous customers who complained about the fee increase stated that the increase was consistent with law and reasonable business standards; it made no mention of making exceptions to the increase. The form letter requested submission of the increased fee to keep the customer's coverage in effect. Customers had to rely on their own persistence to obtain information that exceptions could be made to this price increase. (F. 56)

The exceptions that Orkin would make to the increase of the annual renewal fees changed over time. (F. 58) In his memorandum of August 13, 1980, Mr. Raymond advised branch offices that the only exception to the increase of annual fees would be for customers who could *prove* they had the pamphlet concerning "Orkin 12" by reading point 6 of that pamphlet. If a customer did that, the customer was to be told that a computer *mistake* had been made and that a corrected bill would be sent. (F. 57)

Four months later, in his memorandum of December 11, 1980, Mr. Raymond wrote to branch managers that further exceptions could be made to the increase of annual fees. (F. 58) The procedures for handling price increase exceptions attached to Mr. Raymond's December memorandum instructed branch personnel to attempt to justify the increase if a customer complained. (F. 59) If such justification were not accepted and the customer remained unsatisfied, the customer was to be told the annual fee stated in the customer's contract would be restored if the customer would state *in writing* that at the time of entering into the contract the customer believed the fee would not increase. Whether the customer contacted Orkin by phone or letter, a form letter was to be sent to unsatisfied customers reiterating what the customer must place in writing. (F. 59) This form letter also contained assertions that Orkin had a legal right to raise the annual fee. (F. 59 at "Letter #1") If a customer made this representation to Orkin in writing, Orkin would review the request for restoration of

the original fee. Branch managers were instructed that "while we intend to be flexible in our evaluations you should be alert to any abuses, particularly when complaints from customers exceed 1% of the affected customer base." (F. 58)

Orkin eventually rolled back the annual fee of customers who entered into their termite contracts in 1968, the year Orkin 12 had been promoted. (F. 62) One year after Orkin raised the annual renewal fees, customers with contracts dated 1968 were notified of the rollback by an insert in their renewal notices that were sent from August, 1981, through July, 1982. The insert attributed the rollback to a marketing program Orkin had learned [**72**] about subsequent to the original increase of the annual fees. (F. 62) The marketing program referred to was Orkin 12. This representation was false. Gary Rollins, President of Orkin, had full knowledge of the "Orkin 12" promotion when he made the decision to increase the fees. (F. 45) The decision to roll back the annual fees for 1968 customers was the only exception to the increase that did not place the burden to act on customers.

In the memorandum written by Gary Rollins, then President of Orkin, to R. Randall Rollins, then President of Rollins, Inc., Gary Rollins listed as one option in respect to the proposed increase in annual renewal fees to "write customers and put on voluntary basis." Another option was to "raise and handle exceptions." It was this latter option that Orkin chose. Customers were given the option of paying the higher fee or losing protection. Only the persistent customers were accommodated. Thus, Orkin's "accommodation" programs were not viable means by which customers could have avoided injury.

Orkin contends, however, that the guarantee at an alleged fixed renewal fee was really "icing on the cake"; that consumers really did not rely upon this contract provision at the time the contracts were executed. (Resp. Brief, pp. 50–52; Resp. Reply, p. 14) According to Orkin this lack of reliance on the guarantee at a fixed annual renewal fee is shown "by the remarkably low percentage of Orkin's pre–1975 customers who objected to or refused to go along with the 1980 increase." Orkin states that "at a minimum" the evidence creates a "genuine question of material fact" as to the extent Orkin's pre–1975 customers bargained for an assurance from Orkin that the initially stated annual renewal fee was fixed. (Resp. Brief, p. 53)

Orkin contends that most customers first became interested in termite protection after discovering that they had a termite problem; that most customers were concerned principally with getting prompt termite treatment and not with a long-term guarantee; that Orkin was contacted because of its reputation; that customers did little "comparison shopping" before electing to contract with Orkin; and that "a good number" of customers contracted with Orkin irrespec-

tive of the "lifetime" guarantee, the initially stated annual renewal premium, or whether Orkin [73] could, or would, ever raise the annual renewal premium.[11] (Resp. Brief, pp. 51–52)

Orkin contends, in effect, that the fixed annual renewal rate was of secondary or little importance to consumers.[12] Assuming that Orkin's contentions are true, they are of peripheral significance in this case. Many sales or "deals" are made possible by the "icing on the cake" that is offered as part of a deal. It is this something extra that convinces the consumer to make the contract. After making a contract, consumers are entitled to receive everything contracted for, whether it was the primary inducement or secondary inducement in the agreement. Any determination to permit only partial compliance with a contract, or to require performance of only the primary benefits of the contracts, would make a mockery of contract law and consumer protection. Further, the evidence which Orkin cites as support for the proposition that the fixed annual fee was not of significance to consumers does not support this claim. (*See* Resp. F. 94–95) Witnesses Trahant, Hoffman, Thompson and Terrebonne, cited by Orkin, testified that the fixed annual renewal fee was of significance to them.

The fact that as of August 1, 1984, 164,402 pre–1975 customers were paying the annual renewal fee and over 142,000 of those customers paying the *increased* annual renewal fee, is strong evidence that Orkin's customers value the protection being [74] offered by Orkin's lifetime guarantee.[13] (F. 66–67) Further, in 1968, Orkin spent $1,157,000 advertising the Orkin 12 program which promoted the lifetime protection concept at a fixed annual renewal fee. This is also strong evidence that Orkin believed the lifetime protection plan was of significance to consumers. (F. 27) As of 1980, Orkin had 647,128 termite renewal accounts. (RX 650Z28) According to Orkin, its major competitors offer lifetime guarantees on their termite control services contracts. (Resp. F. 15–19) The fact that Orkin and its competitors offer

[11] Respondent Orkin also contends that "a not insubstantial number" of customers holding pre–1975 contracts were or are not the original homeowners who actually contracted with Orkin, and it is unlikely these purchasers relied on the "lifetime" guarantee or the initially stated annual renewal rate. The new homeowner steps into the shoes of the original contracting party, pursuant to a feature *advertised* and *promoted* by Orkin (*see* the Orkin 12 pamphlet—F. 28, the February, 1973, promotional literature—F. 33, and the "Termite Sales Training Lessons 1–6 - F. 35), and is entitled to the same protection as the contracting homeowner. The termite protection offered by Orkin's guarantee must have had some significance to the new homeowners, if payments under the guarantee were continued.

[12] The Commission assumes that all expressed claims are material, and that implied claims are material if they pertain to costs. *International Harvester Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,217 at 23,178.

[13] In the letter sent to pre–1975 customers notifying customers of the increase in the annual renewal fees, Orkin stated:

> Thank you for being an Orkin customer and allowing us to protect your home against wood infesting organisms. We're sure you agree this protection is as important as homeowner and fire insurance, but it is much less expensive.

(F. 47)

lifetime guarantees is a strong indication that this service is of importance to consumers. (Nolen AFF. ¶ 6) Normal attrition in Orkin's annual renewal contracts is only 5.8% overall, and only 5.2% on contracts in effect over five years (F. 66), another indication of the significance to consumers of the continued guarantee. At the time of the increase in 1980 of the annual renewal fee, the affected customers had been paying annual renewal fees for from five to fifteen years. Since consumers continue to pay the annual renewal fees to maintain their termite protection, it is concluded that customers place a definite value on the lifetime protection guarantee.

Orkin also argues that the pre–1975 customers could receive "substantially" the same protection that they received from Orkin from any of Orkin's competitors who also offer a "lifetime" guarantee, and that such competitors would have assumed Orkin's pre-1975 contracts at their initially stated annual fee, "or for fees less than those charged by Orkin after the 1980 increase." (Resp. Reply, p. 15; Resp. F. 72) The evidence cited by Orkin does not support this contention. Witnesses Murphy, Hromada and Tindol state that they have, on occasion, picked up the contracts of competitors at the fixed contract rate. From this general testimony it cannot be concluded that these competitors would pick up some, or *all*, of Orkin's pre–1975 contracts at the contract rate fixed prior to 1975. Gary Rollins, President of Orkin, testified that he would doubt that competitors would accept the Orkin contracts at the pre–1975 rates. (F. 71)

One of the basic arguments advanced by Orkin in this proceeding is that the inflation in costs has caused Orkin to sustain a loss on the pre–1975 accounts even with the increase in [**75**] fees that was made in 1980. Orkin's loss would be much greater if the rates were rolled back to the initial fixed rate. (F. 72) It would be illogical, indeed, to conclude that competitors would service Orkin's pre–1975 customers at the initial fixed annual renewal fee and inevitably sustain a loss on the contracts. Thus, consumers could not avoid injury by switching to Orkin's competitors.

There is an adequate record on which to determine that the fixed annual renewal fee was of value to consumers and was of significance to consumers in entering into contracts with Orkin. Therefore, no evidentiary hearing is necessary on these issues. It also is concluded that customers suffered substantial injury when Orkin in 1980 raised the fixed annual renewal fees on pre–1975 contracts, and that the pre–1975 customers could not reasonably have avoided this injury.

(4) There Were No Countervailing Benefits to Consumers or Competition

Orkin's pre–1975 customers have not benefited from Orkin's raising of the annual renewal fees that they must pay to continue their guarantees. All that customers have received from the increase in annual renewal fees is the additional burden of paying more for Orkin's services than they had originally agreed upon. Orkin's guidelines and standards for quality of services rendered under its termite guarantees did not differ either before or after the annual renewal fee increase depending on whether or not the customer's termite contract was a pre–1975 contract; nor did Orkin ever consider lowering the quality of service to pre–1975 customers. (F. 70) Furthermore, customers were not in danger of losing their protection under the guarantee as a result of Orkin going into bankruptcy. Orkin is and has been a profitable concern at all times with a substantial net worth. (F. 6) Thus, the increase in annual renewal fees did not offer any countervailing benefits to pre–1975 customers.

Orkin's raising of the annual renewal fees has not provided any countervailing benefits to competition. Information as to the availability, nature and prices of products and services plays an indispensable role in the allocation of resources in a free enterprise system. *See Bates v. State Bar of Arizona,* 433 U.S. 350, 364 (1972). Based on information available to them, consumers make their purchase decisions once they find an acceptable price and quality mix among the relative offerings of competing sellers. "One effect of healthy competition is to redirect production and sales from less efficient firms to more efficient rivals." *International Telephone & Telegraph Corporation,* 3 Trade Reg. Rep. (CCH) ¶ 22,188 at 23,082 (July 25, 1984). Assuming an economic model of a competitive market, consumers will choose the seller who offers the lowest price for a given level of quality. Assuming a normal competitive return, the seller with the lowest price has the lowest costs per unit and is the most efficient. In this [**76**] fashion, the market rewards the efficient seller to the ultimate benefit of consumers.

Orkin's action reduces the reliability of the price information that consumers have in making their purchase decisions. If, in a previously undisclosed manner, a seller is allowed after the transaction is consummated, to raise the total price of services rendered, consumers will be unable in the first instance to determine the seller offering the lowest total price for a given quality of service. Inefficient sellers would be able to mask their inefficiency until after the sale was made and at a later time reveal the higher price. The competitive process of rewarding efficient competitors would be impaired if a seller is

allowed to except itself from the competitive process by unilaterally changing the bargains it has made.

Contracts are used in our society to promote value exchanges. They do so by defining the terms of exchanges parties have agreed upon and by providing increased certainty that the exchanges will occur as agreed. A basic tenet of contract law is to preserve mutually agreed-upon bargains that have been freely recorded in contract terms. Courts will not remake contracts for the benefit of one party and the detriment of another; nor will courts allow a unilateral modification of a contract. These policies of the law seek to avoid the loss to a party of the basis of his bargain. By refusing to perform as promised, Orkin threatens the integrity of contracts and their vital role in value exchanges. Competition will suffer if the integrity of contracts can be abrogated at the instance of one party to the contract. Marketplace confidence will be lost and competition will suffer.

Orkin raises several defenses to this issue of countervailing benefits to consumers and competition. Orkin argues that any order compelling Orkin to roll back the annual renewal fees on its pre–1975 contracts, and forbidding it from raising these fees for the lifetime of the agreements, would have severe adverse repercussions on its entire customer base, and on many of its smaller competitors, that would more than offset any cost savings that may be enjoyed by Orkin's pre–1975 customers.

If pre–1975 customer annual renewal rates are frozen at the pre–1975 rates, post–1975 customers will be left to carry the full burden of escalating costs of servicing all Orkin customers. One group of customers would be subsidizing another, which, according to Orkin, would be unfair and at odds with what should be the policy underlying Section 5 enforcement. (Resp. Brief, pp. 55–56) Orkin contends its competitors would also suffer if its pre–1975 contracts were deemed not to permit any increase in their initially stated annual renewal premiums. A number of other termite control companies collectively have outstanding numerous similar contracts and most, if not all, of these competitors have raised the annual renewal rates on their contracts. Any ruling in this proceeding that jeopardized these [77] past increases by these competitors, or any future raises, could endanger the survival of certain of these smaller operators which make up the bulk of the industry. In addition, it would be difficult, if not impossible, for competitors of Orkin successfully to solicit any pest control business from any of Orkin's more than 142,000 remaining pre–1975 customers so long as Orkin is foreclosed from increasing the annual renewal fees. These customers will essentially be "locked" into Orkin and removed from the normal interplay of unrestricted market forces.

Upholding Orkin's right to raise the annual renewal premiums on its pre–1975 contracts would be accompanied by substantial economic and equitable advantages to both the majority of its termite control services customers and many of its competitors. Orkin submits that these purported gains outbalance any injury that allegedly would be sustained by its pre–1975 customers if they are required to pay a more fair proportion of the actual costs of honoring their pre–1975 guarantees.

Assuming that Orkin will increase the annual renewal fees of post–1975 customers above what it would normally do, to recoup in part the loss of revenue from the inability to increase pre–1975 annual renewal rates, this may not have the anticompetitive consequences which Orkin foresees. If the industry is as fragmented and competitive as Orkin contends (Resp. F. 85), Orkin may not be able to increase post–1975 annual renewal fees to the extent desired due to competitive pressures. Orkin may have to become more efficient to overcome the shortfall in revenues, or suffer a decline in profits. This could enhance competition in the industry. Under this competitive scenario post–1975 customers would not be subsidizing pre–1975 customers. To the extent there is some subsidization, economics provides no efficiency judgment on the transfer of wealth between various individuals. However, competition will be enhanced generally if sellers are required to perform according to their contracts and consumers are able to rely upon the integrity of the marketplace. To permit unilateral modification or breach of contract by sellers would be disastrous to consumers and to competition generally.

The effect on competitors of a ruling in this proceeding requiring Orkin to roll back its price increase on pre-1975 contracts and prohibiting any future fee increase is grossly overstated by Orkin. If competitors have contracts similar to the Orkin pre–1975 contracts, and have increased renewal fees which they may have to roll back, consumers and competition will benefit. If some competitors have to go out of business as a result, which is highly unlikely, others can enter and grow and fill the void, since entry into the termite control business is easy, requiring little capital and expertise. (F. 5) If all termite control companies honor their guarantees, the industry will be operating on a higher ethical level, from which consumers and competition will benefit. [78]

The effect on Orkin's competitors of a price freeze on Orkin's pre–1975 customers will be minimal, if there is any discernable effect at all. Orkin states that all competitors now offer lifetime guarantees. Customers who receive a lifetime guarantee from one company will be unlikely to switch to another company. Thus, within the industry these guarantees tend to freeze customers with the company that

performs the initial treatment to the premises. Further, Orkin's pre–1975 customers have been tied to Orkin; some as long as eighteen years (1966–1984). Being tied to Orkin for a longer period will have little or no additional effect on competitors. The market for termite control services is immense. Growth of new construction creates a growing market, especially in the South and Southwest, where such services are in demand. (F. 2) The small segment of the market represented by Orkin's pre–1975 customers, which declines normally each year, represents no threat to competitors. In a pretrial ruling in this proceeding which rejected Orkin's assertion of injury to competition, it was stated:

> There is little likelihood that the number of customers receiving, or eligible to receive, respondent's asserted "below cost prices" will enable respondent to acquire a monopoly in any relevant market, nor does it appear that such prices will create a dangerous probability of monopolization.

(Order Denying Respondent's Motion For Reconsideration Of Its Motion For An Order Requiring Access To Documents Pertaining To Costs, p. 2, October 2, 1984)

It appears that there are no countervailing benefits to consumers or to competition that outweigh the injury to consumers caused by Orkin's increase in the annual renewal fees on pre–1975 contracts.

D. *Orkin's Other Defenses*

(1) Good Faith Reliance on Legal Opinions

During December, 1978, Orkin received a legal opinion from Arnall, Golden & Gregory, regarding the permissibility of increasing the annual renewal fees of pre–1975 customers. The law firm concluded that Orkin's pre–1975 contracts were of indefinite duration and terminable after a reasonable time. James M. Schneider, General Counsel of Rollins, Inc., reviewed the legal opinion received from Arnall, Golden & Gregory, and confirmed to management the conclusions reached in the opinion. (Resp. F. 39) Orkin contends that Gary Rollins relied upon these opinions [**79**] in his decision to increase the annual renewal fees of pre–1975 customers.[14] (Resp. F. 38, 41)

There is reason to doubt Orkin's claim of good faith reliance on these legal opinions. The issue considered by the law firm was "are there any grounds for the claim that a contract which may be renewed or extended from year to year, indefinitely, is unenforceable?" The firm also assumed that the Orkin contract involved "a right *to extend*

[14] Orkin also references a legal opinion it received from a Florida law firm in 1981, after the price increase decision had been made and implemented, as a good faith basis for continuing in effect the price increase. (Resp. F. 47–48) Since this legal opinion was received *after* the price increase had been implemented, it could not have contributed in any way to the earlier decision to increase the annual renewal fees.

the term of the original contract and here the issue would be two-fold: (1) possible failure as a perpetual contract and (2) possible failure for indefiniteness of terms." (emphasis in original) The issue considered by the law firm and the assumptions by the firm do not meet the issue presented within the four corners of the Orkin contracts—does a contract that guarantees lifetime protection to a designated property upon payment of a stated annual renewal fee have a determinable duration? Further, it is established that at the time Mr. Schneider reviewed and confirmed the legal opinion rendered by the law firm, Mr. Schneider was not aware of the Orkin 12 promotion. Since Mr. Schneider was not aware of the Orkin 12 promotion and was the person who communicated with the firm, it is questionable whether the law firm was aware of the promotion. (*See* F. 41) The Orkin 12 promotion stated:

LIFETIME GUARANTEE. Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

(F. 28) (emphasis in original)

The Orkin 12 promotion, quoted above, is a clear statement by Orkin that the Lifetime Guarantee protects the property against termite reinfestation *for the life of the structure.* Had the law firm of Arnall, Golden & Gregory, and Mr. Schneider, had this information before them at the time of rendering legal advice, it is probable that they would not have assumed the contract to be perpetual or indefinite in duration. [80]

Gary Rollins, when he wrote his synopsis to R. Randall Rollins concerning the proposal to increase the annual renewal fees on pre–1975 contracts, did not mention any legal opinion as a basis for his decision to increase the annual renewal fees. Gary Rollins' synopsis indicates that he expected there could be problems with state regulatory agencies and customer lawsuits. (F. 43) Had the legal opinions of counsel played a significant role in his decision to increase the annual renewal fees, it seems likely he would have mentioned this fact in his recommendation.

The Commission's complaint has charged Orkin with raising the fixed annual renewal fees on its customer contracts in contradiction of its agreements with customers to maintain the fixed annual renewal fees for the life of the structure. Orkin's subjective state of mind or intent at the time it increased the annual renewal fees is immaterial to the violation of law charged in the Commission's complaint. Further, it is settled law that a party cannot be absolved from liability

because it relied on the advice of counsel. As the court stated in *Gregg v. Chauffers, Teamsters and Helpers Union Local 150,* 699 F.2d 1015, 1017 (9th Cir. 1983):

> Such a rule would virtually eliminate a remedy for arbitrary, discriminatory, or bad faith union action, as long as an attorney recommended such action. We are not persuaded that reliance on an attorney's advice should insulate the union from liability for its breach of its duty to represent its members fairly.

(2) Costs

Orkin has raised the specter of its increased costs in servicing pre–1975 contracts at the fixed annual renewal fee stated in its contracts, and the loss Orkin will suffer if prohibited from increasing the annual renewal fees. (Resp. F. 82–83) "As a general principle, difficulty or even improbability of accomplishment without financial loss will not release a party from his contract." 17 Am. Jur. 2d, Contracts Section 402 Further, Orkin's financial condition does not appear to be imperiled by any financial loss it may sustain in fulfilling its contractual obligations to its pre–1975 customers. (F. 6)

(3) Public Policy Considerations

Orkin maintains that public policy recognizes the fairness and legitimacy of Orkin's increase in the annual renewal fees on its pre–1975 contracts. Orkin states that any finding that Orkin's conduct constitutes an "unfair act or practice" would squarely contradict the statutory and common law of each of the states in which Orkin entered into these agreements. Further, Orkin stresses that thirteen states "have declined to take any action against Orkin" after carefully reviewing Orkin's "accommodation" programs which have excepted certain customers [81] from the price increase. Six of these states, according to Orkin, have acknowledged that the accommodation program is a reasonable response to Orkin's need for additional revenue to cover continually escalating costs of its termite operations. (Resp. Brief, pp. 59–60)

A basic tenet of contract law is that private agreements should be enforced according to their terms. Courts will not make a better contract for the parties than that which they have seen fit to enter into, nor will courts alter a contract for the benefit of one party and to the detriment of another. *Williams Petroleum Co. v. Midland Cooperatives, Inc.,* 539 F.2d 694, 696 (10th Cir. 1976). Orkin claims that at the time it entered into the pre–1975 contracts no one anticipated that inflationary pressures would be a major problem. (Resp. Brief, p. 38) Prior to 1966, Orkin limited the duration of its guarantees to five to fifteen years. In 1966, Orkin commenced a marketing program offer-

ing lifetime guarantees at a fixed annual renewal fee. Thus, Orkin accepted the risk of costs increasing over time, the possibility of which was certainly known to Orkin. Customers were placed under duress by Orkin when the price increase was announced; the customers had no choice but to pay the increase or lose the protection. The bargaining power of the parties was weighted heavily in favor of Orkin. Orkin has cited no statutory or public policy statement that would support such a unilateral breach of a contract.

Orkin's claims that inaction by thirteen states after reviewing Orkin's accommodation program, and approval by six states of Orkin's accommodation program, amounts to an expression of public policy approving Orkin's acts and practices. This is an overstatement of the significance of this state action. Each of these states challenged Orkin's right to increase the annual renewal fees on pre–1975 contracts, and each state accepted Orkin's pledge to roll back the price increase on every customer who complained and insisted that Orkin had represented that the annual renewal fee would remain fixed. The record is not clear as to the care with which the various states reviewed the facts of customer complaints. Certainly there is no indication that the states have reviewed a record such as is presented in this Commission proceeding; nor is there any substantial evidence of why the states chose not to take any further action after being presented with Orkin's accommodation program.[15] The North Carolina Attorney General's office stated: "That we have made this enforcement decision in no way changes our view that Orkin is probably required to live by the letter of those contracts." (CX 222) The Maryland Attorney General's office has indicated [82] that the State of Maryland is awaiting the Commission's action in this proceeding.[16] (CX 410)

The actions of the states in accepting Orkin's accommodation program in settlement of consumer complaints indicate at most an exercise of prosecutorial discretion. These actions by the states do not express a public policy that is "declared or embodied in formal sources such as statutes, judicial decisions, or the constitution as interpreted by the courts. . . ." *Unfairness Statement* at 12. State action does not foreclose the Commission from taking such further action as the public interest may require. *See FTC v. Sperry & Hutchison Co.*, 405 U.S. 233, 239 n. 4.

[15] Orkin's accommodation program amounts to nothing more than Gary Rollin's recommendation at the time Orkin increased the annual renewal fees on pre–1975 contracts—"[R]aise and handle exceptions." (F. 43)

[16] The states of Florida and Louisiana have instituted court action against Orkin. (*See* fn. 9, *supra*)

III. Relief

It is well established that "the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices" and that, so long as the remedy selected has a "reasonable relation to the unlawful practices found to exist" the courts will not interfere. *Jacob Seigel Co. v. FTC,* 327 U.S. 608, 611 (1946); *see also, FTC v. Cement Institute,* 333 U.S. 683, 726 (1948); *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965); *L.G. Balfour Co. v. FTC,* 442 F.2d 1, 23 (7th Cir. 1971).

The relief proposed in the complaint includes provisions that would prohibit Orkin from collecting or receiving from any consumer any annual renewal fee for termite protection which is greater than the fixed annual renewal fee specified in the consumer's contract, unless the contract clearly discloses that the fee may be increased. Orkin would be prohibited from terminating or modifying any agreement with a consumer by any means inconsistent with the contract terms. Orkin also would be required to notify each consumer with whom Orkin has an agreement containing a fixed annual renewal fee that Orkin is prohibited from collecting or receiving any annual renewal fee which is greater than the fixed annual fee specified in the agreement. The proposed relief also states that, if the facts are found as alleged in the complaint, the Commission may seek relief to redress injury to consumers under Section 19 of the FTC Act. Section 19 relief is not before the administrative law judge in this action and will not be considered further. *See Electronic Computer Programming Institute, Inc.,* Dkt. 8952, 86 F.T.C. 1093, 1097 (Interlocutory Order, Nov. 11, 1975). **[83]**

Complaint counsel has requested an order along the lines of the relief proposed in the complaint. In addition, complaint counsel would require Orkin to mail to each pre–1975 customer (or his successor in interest) a notice in the form of a letter which would inform each customer that the Commission has ordered Orkin to roll back the annual renewal fee on the customer's contract. This notice would advise those customers whose contracts have lapsed since Orkin increased the annual renewal fee in 1980, that Orkin will honor the terms of the customer's guarantee at the fixed annual renewal fee in the pre–1975 contracts. Complaint counsel is not seeking restitution or refund of any increased payments that have been made by pre–1975 customers.

Orkin objects to complaint counsel's proposed letter to all pre–1975 customers as unnecessarily and improperly disparaging of Orkin. Orkin also objects to the broad category of customers complaint counsel's proposed order would require Orkin to notify about the roll back

in annual renewal fees. Orkin maintains that it is unnecessary and not a remedy of any alleged unfair act or practice to send notices to the approximately 21,500 customers who have had their annual renewal fees rolled back and frozen at the renewal fee initially stated in their contracts. Orkin also states that first class postage to this group of customers would impose unreasonable and unduly burdensome costs upon Orkin with no countervailing benefit to consumers. Such a notice also would be confusing to their customers, according to Orkin.

Orkin foresees legal and practical difficulties in complaint counsel's proposed requirement that Orkin notify and, in effect, reinstate those former pre–1975 customers who have chosen not to continue their Orkin contracts since the announcement of the 1980 increase. This requirement is reasonably related to the remedy sought by complaint counsel only if those customers stopped paying their annual renewal fees because of the 1980 increase of their premiums. Cancellations by pre–1975 customers has not exceeded to any appreciable degree Orkin's usual cancellation rate. (F. 66)

Orkin points out that there are many reasons why these former pre–1975 customers may have failed to renew their contracts. For instance, they may have obtained similar services elsewhere at a lower rate; they may no longer have felt the need for termite service because the problem which caused them to call Orkin initially had been rectified; or, they may have sold the covered residence to subsequent owners who chose not to continue the coverage. To comply with the proposed order, Orkin would have to send notices to the record addresses of all those pre–1975 customers who received notice of the increase in 1980. Many of these notices would go to the new owners of residences, once covered by pre–1975 contracts, who have never been Orkin customers. This would cause great confusion and numerous administrative difficulties. Orkin states that the requirement that Orkin reinstate the guarantees of those pre–1975 customers [84] who have not renewed their contracts, exposes Orkin to either unwarranted risk or expense. Unless these former customers have, in the interim, contracted with another termite service, their homes have gone uninspected and untreated for up to five years. Orkin should not be deemed to have guaranteed these structures against damage which may have occurred during the period when Orkin did not service the premises. In addition, even if these former customers have received, in the interim, termite control services from another company, Orkin should not be required to guarantee the work of the other companies. To eliminate the risk inherent in reinstating cancelled guarantees, Orkin would have to undertake, at great expense, the retreatment of each of these structures.

Finally, Orkin argues that complaint counsel's proposed order denied Orkin and its pre–1975 customers the right to modify their contractual relationship by mutual agreement. This is contrary to well-established principles of contract law (*see, e.g., Restatement (Second)* Sections 273, 279 and 280), and serves no remedial purpose. Any remedial order entered in this proceeding should expressly provide that Orkin may, in the required notice or at any other time, offer its pre–1975 customers the opportunity to substitute, for additional consideration, Orkin's current contracts for their pre–1975 contracts, or seek any other modification or novation permitted under recognized principles of contract law.

Orkin has also submitted an alternative proposed notice to be sent to its current, unfrozen pre–1975 customers, which Orkin submits avoids some of the difficulties inherent in complaint counsel's proposed notice.

The arguments presented by Orkin in respect to the 21,500 customers who have had their annual renewal fees rolled back and frozen at the initial contract level are persuasive. Since these customers already have received all the relief complaint counsel proposes, it is unnecessary to notify them of the Commission's action in this matter. It also has the possibility of causing some confusion to these customers. Finally, it would be burdensome and expensive to Orkin to perform what is essentially an unnecessary act. The order to be entered herewith will exclude these customers from the notice being required by the order to be sent to pre–1975 customers. The other remedial provisions of the order will assure that Orkin does not increase the annual renewal fees of these customers, except as provided in the order.

Orkin's argument in respect to the pre–1975 customers who failed to keep their guarantees in effect spells out the difficulties which will be encountered in any reinstatement of the guarantees of those customers. First, it is not known why these customers failed to renew their guarantees, and it would be impractical to attempt to ascertain the reasons the customers did not renew their guarantees. Some customers may have renewed [85] their contracts in 1980, but failed to continue the guarantee in later years. Only if the failure to renew was due to the increased annual renewal fee would these customers be entitled to relief. As Orkin points out, the cancellation rate of pre–1975 customers after the 1980 increase in the annual renewal fees did not exceed the usual rate of cancellation of all customers.

The more serious problem raised by Orkin concerns the fact that Orkin would be required to reinspect and possibly retreat the premises of customers who allowed their guarantees to lapse, and Orkin would be liable for any reinfestation or damage which may have

occurred during the period since 1980. Further, some customers who were really interested in continuous protection against termite infestation and objected to Orkin's price increase may have contracted with other termite control companies since 1980. This could cause some problems between Orkin and its competitors, if Orkin offers to reinstate its guarantees to such customers. Also, this could cause confusion to the customers.

In sum, it appears that requiring reinstatement of all pre–1975 customers who did not renew their guarantees, or who renewed their guarantees in 1980, but later determined to drop the protection, would cause many problems and much confusion to the extent that such relief is not warranted.

Some of the criticisms which Orkin has leveled at complaint counsel's proposed notice are well taken. Orkin's proposed notice is unacceptable in its entirety. An appropriate notice has been ordered. The notice will be sent only to those pre–1975 customers who are still renewing their termite protection at the increased annual renewal fee. The requirement that this notice be sent to those 21,500 customers who have had their annual fee rolled back is unnecessary, would require additional costs to Orkin, and could be confusing to those customers.

Under terms of the order entered herewith, Orkin is prohibited from charging or receiving from *any* pre–1975 customer any annual fee that is greater than that specified in the pre–1975 contracts or pre–1975 guarantees. This provision would include those pre–1975 customers whose annual renewal fees have already been rolled back. Orkin is also prohibited from refusing to accept payment of the annual renewal fee stated in the pre–1975 contracts or pre–1975 guarantees, and from refusing to perform the obligations specified in such contracts and guarantees when the annual renewal fee is tendered.

Orkin is also prohibited from requesting, charging, collecting or receiving from *any* customer any annual renewal fee that is greater than the annual fee stated in the customer's contract or guarantee, unless the contract specifically provides that Orkin may increase the annual renewal fee. Orkin is prohibited from modifying or changing any customer's contract or guarantee by any means not specified in the contract or [86] guarantee. These are fencing-in provisions which are necessary to insure in the future that Orkin does not unilaterally and in contradiction of its contracts, modify or change its customer contracts. As has been shown by this record, most customers were at the mercy of Orkin when their contracts were changed. They had no choice but to agree to the modification, or lose protection. These fencing-in provisions will assure that Orkin will not repeat in the future the violation which occurred in the past. Additionally, Orkin will not

be unduly burdened by these provisions since contracts easily can be drafted which will set forth the procedures for contract modification or change.

A proviso has been included in the order which will permit Orkin to seek a modification or novation of its pre–1975 contracts. It seems reasonable to permit Orkin to contact these customers and seek approval of customers for a contract change. This provision will require customers approval for any contract change, and is in stark contrast to Orkin's past action in unilaterally modifying its customer contracts. Two safeguards have been written into this proviso. First, no attempt at contract modification can be made until customers have made two annual renewal fee payments at the rate specified in the pre–1975 contracts. This is to prevent any confusion which might arise if Orkin sends out the notice letter that fees are being rolled back and at the same time asks for contract modification. The two year period will enable the customer to comprehend the value of the reduced annual renewal fee, and to consider any request for contract modification separate and apart from the fee roll back. The additional safeguard requires Orkin to obtain approval from the Commission of any materials or communications with these customers in respect to any request for contract modification. This provision will assure that all communications will be clear and understandable, and that no customer will be pressured or misled in any material respect.

IV. Conclusions of Law

1. The Federal Trade Commission has jurisdiction over respondent and the subject matter of this proceeding.

2. At all times relevant herein, respondent has maintained a substantial course of business, including the acts and practices as hereinafter set forth, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. In contradiction of the agreements it had entered into with its pre–1975 customers, from 1980 to the present respondent has raised or attempted to raise the amount of the annual renewal fees stated in the agreements, thereby causing substantial and ongoing injury to such customers. [87]

4. The substantial and ongoing injury to respondent's customers is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.

5. Respondent's acts and practices as described in Paragraph 3, above, constitute unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)).

6. The order entered hereafter is necessary and appropriate to remedy the aforesaid violations of law.

ORDER

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *Customer* shall mean any consumer or business owning or holding a termite control services contract or guarantee entered into or issued by respondent.

B. *Pre–1975 contract* shall mean any contract entered into by respondent for the purpose of supplying services to control termites, wood-infesting organisms, moisture, or wood decay to its customers that includes the term "lifetime" and does not mention adjustments to or increases of the annual fee (which annual fee must be paid to continue the lifetime [88] guarantee issued with respect to such contract), except and unless the treated premises are structurally modified, altered or otherwise changed after the date of initial treatment.

C. *Pre–1975 guarantee* shall mean any guarantee extended by respondent to a customer in connection with the execution of a pre–1975 contract.

D. *Pre–1975 customer* shall mean any customer owning or holding a pre–1975 contract and/or pre–1975 guarantee to whom Orkin sent a notice of the increase in annual fee and who has submitted an annual fee each year since such increase of annual fees occurred.

II.

It is ordered That respondent, Orkin Exterminating Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any product or service to [89] protect a house, building or other structure from termites, wood-infesting organisms, moisture, or wood decay, shall forthwith cease and desist from:

A. Requesting, charging, collecting or receiving from any pre–1975 customer (or his successor in interest) any annual fee that is greater

than that specified in the pre–1975 contract or pre–1975 guarantee of that customer.

B. Refusing to accept from any pre–1975 customer (or his successor in interest) the amount of the annual fee stated in the pre–1975 contract or pre–1975 guarantee of such customer.

C. Refusing to perform the obligations specified in the pre–1975 guarantee of any pre–1975 customer (or his successor in interest) who tenders payment of the annual fee stated in that customer's pre–1975 contract or pre–1975 guarantee within two months of the anniversary month of the initial treatment by Orkin, and/or refusing to perform such guarantee obligations in any succeeding year in which a pre–1975 customer (or his successor in interest) tenders payment of the annual fee specified in his pre–1975 contract or pre–1975 [**90**] guarantee within two months of the anniversary month of the initial treatment by respondent.

D. Requesting, charging, collecting or receiving from any customer owning or holding a contract or guarantee any annual fee that is greater than the annual fee specified in the contract or guarantee of the customer, unless said contract or guarantee clearly and conspicuously discloses that such annual fee may be raised at respondent's option.

E. Modifying, changing or altering, or attempting to modify, change or alter, any contract and/or guarantee by any procedure, method or means not clearly and conspicuously disclosed in any such contract or guarantee.

Provided, however, That nothing contained in this order shall prevent respondent from seeking a modification or novation of its pre–1975 contracts and pre–1975 guarantees with its pre–1975 customers which would permit, *inter alia,* a change in the annual fee to be paid or the services to be rendered, *provided further,* that no such attempt to seek modification or novation shall be made until each such customer has received a notice of this order, as provided in Part III hereof, and has made at least two annual fee payments at the annual fee specified in the pre- [**91**] 1975 contract and/or guarantee, and *provided further,* that respondent shall obtain approval of the Federal Trade Commission for each and every document or representation which respondent may use or make in any attempt to seek a modification or novation of its pre–1975 contracts and/or pre–1975 guarantees as provided herein.

III.

It is further ordered, That respondent shall send each pre–1975 customer (or his successor in interest) by first class United States mail

the following notice no later than two months prior to the anniversary date of the initial treatment rendered to such customer:

Dear Customer:

This letter contains important information about a decrease of your annual fee. Please read it.

Beginning in 1980, Orkin increased the annual fee for certain of its customers whose lifetime guarantees did not give Orkin the right to raise the annual fee. You were one of the affected customers. The Federal Trade Commission has ordered Orkin to roll back your annual fee to the amount stated in your contract or guarantee. Under the [92] terms of the Federal Trade Commission order you will continue to receive the lifetime protection that Orkin has guaranteed as long as you pay the annual fee each year.

There is one exception to this order. If you have structurally modified the treated structure, Orkin may terminate the guarantee or increase the fee under the terms of your original agreement. Absent such a structural modification, Orkin is prohibited from increasing your annual renewal fee without your consent.

If you desire to continue your guaranteed protection, please submit your annual fee along with the enclosed invoice. We suggest you check the amount of the annual fee stated in your contract or guarantee with that of the enclosed invoice. If there is any discrepancy or you have any other questions, please call your local branch.

Sincerely yours,

President of Orkin [93]

Each envelope containing the foregoing notice shall bear the following legend in red 14 point print on its face: IMPORTANT NOTICE OF ANNUAL FEE REDUCTION ENCLOSED.

IV.

It is further ordered, That respondent distribute a copy of this order to all of its current officers, directors, district managers and branch managers, and to future personnel in those positions for the next two years, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That respondent shall for three years file with the Commission every one hundred eighty (180) [**94**] days after service upon it of this order a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

It is further ordered, That respondent shall maintain for a period of five (5) years after service of this order upon it, records that shall show the manner and form of respondent's continuing compliance with the above terms and provisions of this order and make them available for inspection by Commission staff within thirty (30) days of receipt of notice that an inspection is sought.

Opinion of the Commission

By Azcuenaga, *Commissioner:*

This case is before the Commission on cross appeals from an Initial Decision by Administrative Law Judge Ernest G. Barnes granting complaint counsel's motion for summary decision. Judge Barnes found that Orkin Exterminating Company ("Orkin") has engaged in unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1982) ("Section 5"), by unilaterally raising the fixed annual renewal fee on certain of its termite control contracts. We affirm.

Orkin, the self-proclaimed largest termite and pest-control company in the world, sells its pest-control and exterminating services to consumers for their homes and other structures. From 1966 until February, 1975, Orkin offered contracts for pest control and repair services with guarantees for the lifetime of the treated structure as long as the consumer paid a specified annual renewal fee. In 1980, citing the need to recoup some of its rising costs, Orkin decided to raise the renewal fees on [**2**] these contracts. The contracts, however, contained no express language authorizing such an increase. Instead, they offered "lifetime" guarantees and specified payments in stated amounts beginning on a particular date and on the same date each year "thereafter."

The Commission issued its complaint on May 8, 1984.[1] The complaint alleges that Orkin's increase of its annual renewal fees has

[1] In response to an unopposed motion by complaint counsel, Paragraph 3 of the complaint was amended on November 15, 1984, to include the words "and wood decay" in the description of the contract services offered by Orkin.

caused substantial, ongoing and unavoidable injury to Orkin's customers and the public that is not outweighed by countervailing benefits to consumers or to competition. It charges that the company's action has violated Section 5. After a period of pretrial discovery, complaint counsel moved for summary decision with respect to all issues. Orkin opposed the motion and made a cross-motion for summary decision. Orkin also submitted "statements of material facts" that it contended either directly contravene complaint counsel's findings of fact or raise genuine issues of inference and legal significance that foreclose entry of summary decision in favor of complaint counsel. The Administrative Law Judge granted complaint counsel's motion for summary decision and issued his Initial Decision.

Both Orkin and complaint counsel have appealed. Orkin challenges the Initial Decision on several grounds. It objects to the issuance of a summary decision, asserts that the challenged conduct is outside the scope of Section 5, takes issue [3] with various findings and conclusions and asserts that the order is unduly burdensome and does not bear a reasonable relation to the alleged practice it purports to remedy. Complaint counsel's appeal is limited to the assertion that the ALJ improperly limited the scope of the order.

Findings of Fact

These findings, which we have drawn from the Initial Decision and from the parties' filings, reflect only those facts that are not subject to genuine dispute.

I. The Respondent

Orkin is a Delaware corporation with its principal place of business in Atlanta, Georgia. IDF 1.[2] It is a wholly-owned subsidiary of Rollins, Inc. ("Rollins"), by which it was acquired in 1964. *Id.* During the time covered by the complaint, Orkin provided pest-control and exterminating services throughout the United States, operating through branch offices under the supervision of a number of district offices. IDF 2; RIR 32; CX 142Z9; Russell Dep. p. 9; Raymond Dep. p. 32. Orkin has stipulated that it maintains, and at all times mentioned in the [4]

[2] We use the following abbreviations in this opinion:

I.D.	Initial Decision
IDF	Initial Decision Finding
RAB	Respondent's Appeal Brief
RRB	Respondent's Reply Brief
RIR	Respondent's Answer to First Set of Interrogatories
CX	Exhibit to Complaint Counsel's Motion for Summary Decision
RX	Exhibit to Respondent's Motion for Summary Decision and Opposition to Complaint Counsel's Motion
RPF	Respondent's Proposed Findings of Fact.

complaint has maintained, a substantial course of business, including the acts and practices set forth in the complaint, in or affecting commerce within the meaning of Section 5. IDF 3.

Orkin claims to be the world's largest termite and pest-control company. IDF 4. The company's services include treatment of houses, buildings and other structures to destroy or protect against termites, other wood-infesting organisms, moisture and wood decay. IDF 7. Orkin charged a specified amount for the initial treatment of the affected structure, and, under certain conditions, it has issued guarantees of the termite control services provided under its contracts. IDF 8. Since prior to 1956, Orkin has prepared and used its own preprinted form contracts and guarantees that are not subject to modification by its salesmen. IDF 10.

II. Orkin's Pre-1975 Contracts

Before 1966, Orkin generally offered guarantees for continued protection of the treated property at a specified price for an express term of from five to fifteen years. IDF 11. In 1966, Orkin began offering a guarantee for continued protection that would last the lifetime of the treated structure, and the company began using the term "lifetime" in its contracts and guarantees. IDF 11, 26. Orkin was able to offer this initial treatment and lifetime continuing guarantee package, because the primary termiticide it used "was proving to be more successful and more effective than [Orkin] ever thought it would be." IDF 12. Orkin used the lifetime concept as a competitive device "to try to offer a distinctly better service to the public than [its] [5] smaller competitors could offer." IDF 12; Geiger Dep. pp. 16–17. Orkin offered several kinds of lifetime guarantees, including a lifetime retreatment guarantee, a lifetime retreatment and repair guarantee and a lifetime guarantee on pretreatment work on new construction. IDF 13. Generally, the first two of these guarantees provide that after initial treatment and at no extra cost to the customer, Orkin respectively will retreat the covered structure if new infestations occur and make repairs (up to a stated dollar maximum) if it is established that the new damage occurred after the initial treatment. IDF 13–16. The pretreatment guarantee is similar but applies to new construction rather than to existing structures. IDF 17.

Between January, 1966, when Orkin first started using "lifetime" in its contracts, and February 1, 1975, Orkin's termite contracts and guarantees provided that the consumer must pay a specified annual fee in order to continue the coverage of the guarantee. IDF 18. If the customer continued to pay the renewal fee, the guarantee remained in effect for the lifetime of the treated premises, unless they were structurally modified after their initial treatment. IDF 18–19 and 26.

The contracts stated explicitly that the company could adjust the fee in the event of structural modification (IDF 19), but they made no other [6] provision for adjustment of the renewal fee.[3] The language in these agreements, which we refer to in this opinion as "pre–1975" contracts,[4] varied slightly from time to time within the 1966–1975 period, but it is undisputed that all of the contracts contained terms similar to those quoted below.

For example, CX 2A, a contract dated November 30, 1966, specifies an Annual Renewal Premium of $17.00 and provides:

> In addition to the initial term specified in Paragraph 1 above, the Guaranty may, at the sole option of the undersigned, be renewed annually for Lifetime additional years by making payment of the Annual Renewal Premium on or before the renewal date of each subsequent year and Orkin agrees to reinspect the premises upon receipt of each Annual Renewal Premium Payment. [The underlined word was handwritten in a blank space provided in the contract.]

Similarly, CX 414A, a contract dated February 5, 1972, provides for a "Lifetime Control and Repair" guarantee and states:

> ORKIN CONTINUOUS PROTECTION GUARANTY
>
> Orkin's Continuous Protection Guaranty will provide protection for the above named property including Annual Reinspections upon payment of the initial charges and an annual renewal Payment of $37.00 starting February 1973 and each February thereafter. [The underlined words were handwritten in blanks provided in the contract.]

See also IDF 22–23. [7]

The pre–1975 contracts generally contained a clause stating that the contract, graph and specification sheets, and, upon issuance, the guarantee, constituted the complete agreement between the parties. IDF 21. They provided that the agreement could not be changed or altered in any manner, oral or otherwise, by any representatives of Orkin, unless the alterations or changes were in writing and executed by a corporate officer of Orkin under the corporate seal. IDF 21–23. For example, some of Orkin's pre–1975 contracts contained the following language:

> It is understood and agreed between the parties that this Contract, the Graph and Specification Sheets which bear this Contract Number and, upon issuance, the Guaranty constitute the complete agreement between the parties and that said agreement may not be changed or altered in any manner, oral or otherwise, by any representative of

[3] Before 1966, Orkin's form contracts for an express term of years specifically provided for increases in the annual renewal fee that did not depend upon structural modification of the treated structure. IDF 23. On or about February 1, 1975, Orkin began using a similar provision for fee increases in its lifetime guarantee contracts that did not depend on structural modification. IDF 24.

[4] Because it is the term used by the Administrative Law Judge in the Initial Decision and for convenience, we use the term "pre–1975" as an abbreviation for the period of time from January, 1966, to February 1, 1975.

ORKIN unless alteration or change be in writing and executed by a corporate officer of ORKIN EXTERMINATING COMPANY, INC., under this corporate seal. [CX–9B. *See also, e.g.*, CX–10B, 11B, 12B, 13B, 14B, 16B, 19B, 20B, 24B, 25B, 400B, 414B, 473B and 485B; *see also* IDF 21.]

Other Orkin contracts used during the pre–1975 period stated:

It is understood and agreed that ORKIN and the Buyer are bound only by the terms and conditions of this agreement and not by any other representations, oral or otherwise. [CX–449B, ¶8. *See also, e.g.*, CX–1A, 2A, 3, 4A, 5A, 6A, 9A, 12B and 21B; RIR 59–60; *see also* IDF 21.]

The company does not dispute that its pre–1975 contracts used these clauses or clauses of a similar nature.

III. ORKIN 12 ADVERTISING CAMPAIGN

For several months during 1968, Orkin promoted sales of its termite control services through an advertising campaign called "Orkin 12." The promotion was advertised in a pamphlet, on billboards, in magazines and on radio and television. IDF 27. The pamphlet contained the following language: [8]

LIFETIME GUARANTEE. Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

IDF 28; Raymond Dep. Ex. 6 at 2. [Emphasis in original.] The Orkin 12 advertising campaign was in effect for approximately six months but was discontinued before its scheduled expiration date because it failed to produce sufficient consumer sales leads. (Geiger Dep. pp. 34–35); IDF 27.

IV. RENEWAL FEE INCREASE

By late 1978, Orkin had begun to explore the possibility of increasing the annual fee on its pre–1975 contracts and guarantees. Orkin asked James M. Schneider, General Counsel of Rollins, Orkin's parent company, whether the contracts provided a basis on which to increase the renewal fee. He initially concluded that they did not. IDF 55. He stated:

Well, I looked at the contract, and I recall that my reaction was the reaction that—or my initial reaction was that of most people that reviewed the contract, I didn't see offhand a basis for increasing the prices. The provision concerning the renewal prices appeared to be of indefinite duration using words like "hereafter" or "thereafter," and

my instant or immediate reaction was there simply was not a basis for increasing the prices.

Schneider Dep. (2/8/85) p. 19. Later, after "he had pondered" the question "for days and days, . . . it struck [him] that no company in its right mind would ever issue a contract that provided for ongoing services in perpetuity without a right to increase prices." *Id.* [9]

After considering the question himself, Mr. Schneider requested advice from the company's law firm. The firm's two and a half page, unsigned memorandum, dated December 6, 1978, concluded that "the Orkin contract" (unidentified) "would appear to be of *indefinite* duration" (emphasis in original) and, therefore, "would be terminable by Orkin after a reasonable period of time." RX 44A–C; IDF 39. The memorandum does not purport to construe a particular Orkin contract. Nor does it refer to or quote language from any specific Orkin contract. It is explicitly limited to the issue: "Are there any grounds for the claim that a contract which may be renewed or extended from year to year, indefinitely, is unenforceable." It is also explicitly based on the "assum[ption] that the Orkin contract involves a right to *extend the term of the original contract*" [emphasis in original]. IDF 40; RX–44A. The memorandum does not address the proper way to construe the term "lifetime" in a contract. Mr. Schneider reviewed the law firm's memorandum and endorsed its conclusion to Orkin's management. IDF 39.

In February, 1980, before deciding to increase the annual renewal fees on the pre–1975 contracts, Gary W. Rollins, President of Orkin, prepared a synopsis of issues for Rollins' President, R. Randall Rollins, setting out what he believed to be the merits and risks of the renewal fee increase and stating the available options. The single reason he identified in favor of the fee adjustment was the potential increase in income that it would produce. The points militating against the increase included the following: [10]

1. A few customers [were] advised by salesmen and literature that renewal amount would be fixed.
2. State regulatory agencies . . . could interpret our contract in some cases to imply the renewal amount is fixed. Those who obtain old proposal information will discover we put this in writing.
3. Our longer term employees might feel that we are going back on our word.
4. There could be customer lawsuits and complaints.

The options were:

1. Leave as is.
2. Write customers and put [the increase] on voluntary basis.

3. Meet with individual state regulatory and consumer groups to obtain understanding and raise [fee].

4. Raise [fee] and handle exceptions.

IDF 43; Rollins Dep. Ex. 12. Gary Rollins attached to his memorandum the Orkin 12 promotional pamphlet describing the "yearly premium" that "never increases." IDF 45; Rollins Dep. Ex. 12.

Shortly thereafter, Orkin decided to raise the annual renewal fees on the pre–1975 contracts, and the company began notifying the affected customers in August 1980, giving them several months' notice before renewal payments were due. IDF 46 and 48. The annual fees were raised to a minimum of $25 or by 40%, whichever was greater. IDF 50. Orkin sent price increase [11] notices to approximately 207,000 customers.[5] By August 1, 1984, Orkin had increased the annual renewal fees of approximately 142,902 customers with pre–1975 contracts. By May 25, 1981, Orkin had received an additional $1,257,629 solely as a result of the fee increase to its pre–1975 customers, and estimates submitted in this proceeding show that it had received increased revenues through 1984, from the same source, of $7,515,674.

Orkin's announcement brought complaints from customers, who expressed the belief that Orkin did not have the right to raise the renewal fees for pre–1975 contracts. It also brought communications from officials of at least seventeen states, who questioned the lawfulness of Orkin's action. IDF 51 and 73–85.[6]

Customers had few, if any, alternatives to paying the higher fee. Although they could seek to have Orkin's competitors assume the pre–1975 contracts at the initial renewal fee, competitors apparently would not have assumed the contracts without imposing [12] conditions that would have resulted in additional charges to Orkin's customers or subsequently raising the renewal fees as expressly permitted in their own contracts.[7] Indeed, Orkin's President, Gary

[5] The figures in this paragraph appear in the Initial Decision and reflect information produced by the respondent. *See* IDF 64–67 and findings cited therein.

[6] Six of these states, while not conceding that Orkin's fee increase was legal, have accepted some form of accommodation for those Orkin customers within their jurisdictions who have complained about the fee increase either to Orkin or to state officials. IDF 86. In State *ex rel. Guste v. Orkin Exterminating Co.*, No. 83–2166 (Dist. Ct. La., Orleans Parish, Feb. 25, 1986), the court held Orkin liable for breach of its pre–1975 contracts based on the fee increase and declared the breach an unfair trade practice under state law. *See also Orkin Exterminating Co. v. Department of Health & Rehabilitative Services*, No. 81–389 (Fla. Cir. Ct. Oct. 21, 1981), *aff'd per curiam* (Fla. Dist. Ct. App. 1982) (CX 248A–D) (holding, on a stipulated record, that Orkin's pre–1975 contracts provided for a fixed annual renewal fee).

[7] It was not the practice of Terminix, the second largest firm in the industry (after Orkin), to assume other contracts and, when it did so "on occasion," it normally would require reinspection and possible retreatment, apparently at the customer's expense. Hromada Aff. ¶8. Another firm required the customer to produce a "certificate" showing when the property was last treated and also required a "booster retreatment" when considered necessary. Murphy Aff. ¶4. The contracts attached to competitors' affidavits expressly permit the companies to raise or renegotiate their renewal fees after specified periods of time ranging from four to six years following initial treatment. *See* exhibits to affidavits of Hromada and Tindol; *see also* exhibit to Nolen Aff.

Rollins, testified, when asked whether he believed competitors would accept the transfer of the pre–1975 contracts and provide the same lifetime guarantee for the annual fees stated in the contracts, that he "would doubt" that competitors would do that.[8]

Ron Kimbell, Director of Rollins' Customer Service, wrote a letter to Orkin's President, Gary Rollins, dated August 11, 1980, stating that, "[a]fter reviewing these contracts . . . I have concluded that the pre–1975 increase is more questionable than ever." IDF 53; Kimbell Dep. Ex. 10. Mr. Kimbell requested that the fee increase program be "suspended immediately until such time as all parties involved . . . [within the company] can meet and discuss [its] repercussions . . . ." *Id.* [13]

V. Accommodation Efforts.

Orkin did not suspend the fee increase program, but, instead, developed a form letter to respond to complaining customers and created some limited exceptions to the program. Orkin refers to the exceptions and its procedures for granting them as its "accommodation" program. RAB 11. In the form letter, Orkin cited the impact of inflation as the reason for the increase and stated that "this increase is both consistent with law and reasonable business standards." IDF 56; Kimbell Dep. Ex. 6. The form letter said nothing about the company's decision to grant certain exceptions from the general fee increase. *Id.*

In a memorandum dated August 13, 1980, John Raymond, Orkin's Director of Administrative Operations, reiterated to Orkin's branch managers the points made in the form letter but added special instructions for customers who claimed that they had sales literature stating that the renewal fee would not be raised. He referred specifically to the Orkin 12 promotion. IDF 57. Mr. Raymond, in effect, directed the Orkin sales force to insist that complaining customers demonstrate that they had relied upon the Orkin 12 promotion. If, but only if, such a demonstration was made, the salesmen were instructed to inform the customer that Orkin would retract the fee increase. *Id.* Approximately a year later, Orkin decided to roll back the increase for all customers who had entered into their contracts in 1968, the year during which the Orkin 12 promotion had been used. IDF 62. [14]

In a second memorandum to branch managers, Mr. Raymond said that Orkin was willing to make further exceptions to the general fee increase

for customers who state that at the time of purchase they relied on either a sales presentation or they construed the specific wording of the contract to provide that the renewal price would not be increased . . . provided that this exception to the general

[8] Rollins Dep. at 210.

price increase is not abused. It is our chief desire to maintain the goodwill of these customers.

He added:

We are willing to make exceptions to give certain customers the benefit of the doubt. While we intend to be flexible in our evaluations, you should be alert to any abuses, particularly where complaints from customers exceed 1% of the affected customer base.

IDF 58; Rollins Dep. Ex. 23 at 2.

As of August 1984, under its accommodation program, Orkin had granted roll backs to approximately 21,500 pre–1975 customers. IDF 67. Some 15,800 of these customers were subject to the general exception for 1968 contracts. IDF 63, 67. Between August 1980 and August 1984, some 42,600 consumers cancelled their pre–1975 contracts. IDF 66. Although Orkin considered additional increases in the annual renewal fees on pre–1975 contracts, after it had implemented the first increase, it did not do so. IDF 68. Orkin also considered ways to convert [**15**] pre–1975 customers to a new contract that would permit the company to raise the renewal fees again in the future. IDF 69.[9]

Conclusions of Law

The issue before us is whether Orkin has engaged in an unfair act or practice under Section 5 by unilaterally increasing the renewal fees in its pre–1975 contracts. This is not an action at common law for simple breach of contract. Rather it is an action under a federal statute that makes unlawful conduct causing injury to consumers that is substantial, unavoidable and without countervailing benefits. Because determining whether Orkin's conduct was "unfair" depends in large part on what consumers properly could have expected from Orkin under the pre–1975 contracts, we focus first on those contracts before addressing the merits of the unfairness allegations.

I. Summary Decision

In assessing both Orkin's contract obligations and the unfairness of its conduct, we also must consider the propriety of proceeding by way of summary decision. Under Commission Rule 3.24(a)(3)[10], a party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine [**16**] issue of fact for trial." The purpose of the summary decision procedure, as articulated in the 1963

[9] In November, 1981, Orkin's figures show that the pre–1975 contracts comprised about 33% of the company's termite renewal customer base in numbers and less than 25% in dollars. Those figures were expected to "drop naturally through normal attrition over the years." RX 94C.

[10] 16 C.F.R. 3.24(a)(3) (1986).

Advisory Committee Notes to Rule 56 of the Federal Rules of Civil Procedure, is to determine "whether there is a genuine need for trial."[11] The Commission cannot try issues of fact on a motion for summary decision but can only determine whether there are issues to be tried.[12]

The standard for deciding when summary judgment is appropriate is whether the pleadings and any affidavits or other documents on the summary decision record raise genuine disputes of material fact, assuming that ambiguities in those documents and any factual inferences to be drawn from them are construed against the moving party.[13] To forestall summary judgment, the nonmoving party may not simply rely on unsupported assertions but must set forth specific facts that reveal genuine disputes necessitating trial.[14] To determine whether genuine disputes of material fact exist, we must consider three questions: first, whether any disputes Orkin has raised are factual; second, if so, [**17**] whether they relate to material or outcome-determinative issues; and third, assuming the answers to the first two questions are affirmative, whether the factual disputes are genuine—that is, substantiated in the documentation presented by the parties by more than mere assertions or *post hoc* rationalizations.[15]

The issues Orkin has raised are, for the most part, legal rather than factual. To the extent that they involve matters of fact, those facts are not material to our decision, because their resolution in the manner suggested by the respondent would not alter our decision.[16] For example, Orkin cites the reaction of state attorneys general to Orkin's fee increase and increases in renewal fees for customers holding contracts entered into after February, 1975. Both are plainly irrelevant. Orkin also opposes reliance on evidence concerning a portion of an alleged employee training manual as a statement of company policy and the uniformity of Orkin's efforts to train its sales force. We do not rely on this evidence.

To the extent that Orkin's alleged factual disputes purport to place at issue the intent of the parties to Orkin's pre–1975 contracts, we conclude, as discussed in Section II, below, that the disputes are not genuine. To the extent that they are based on unsupported assertions

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[11] The Commission has long accorded deference to the case law on Rule 56 of the Federal Rules of Civil Procedure in construing the meaning of its own rule. *See, e.g., The Hearst Corp.* 80 F.T.C. 1011 (1972); *Lehigh Portland Cement Co.*, 78 F.T.C. 1556 (1971). *See also Kroger Co.*, 98 F.T.C. 639, 728 and n.10 (1981); *American Medical Ass'n*, Dkt. 9064, (April 26, 1976) (Order Denying Motion of Respondent for Summary Decision).

[12] *Heyman v. Commerce and Industry Ins. Co.*, 524 F.2d 1317, 1319–20 (2d Cir. 1975).

[13] *See, e.g., Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986).

[14] Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 482 (1983) (hereafter "Schwarzer").

[15] *Id*, at 469, 484.

[16] *See, e.g., Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984); *United States v. First Nat'l Bank of Circle*, 652 F.2d 882, 887 (9th Cir. 1981).

and conclusions drawn after-the-fact, they do not meet the standard of Rule 3.24(a)(3). [18]

Some of Orkin's points of disagreement, such as those concerning the proper interpretation of the company's pre–1975 contracts, do not constitute issues of pure fact. Instead, they are issues of mixed fact and law, and whether they must be tried depends on which feature predominates. Mixed issues, according to Judge Schwarzer:

> are properly decided by the court and are therefore appropriate for summary judgment if the underlying historical [pure] facts are not disputed. That is true even though the process of decision requires the trial court to "weigh the evidence" on both sides of the argument in deciding what ultimate fact to derive.[17]

The question of how to treat the distinction between fact and law (including law mixed with fact) frequently arises with specific reference to the interpretation of contracts. The question of the meaning of the words of a contract, is a question of fact, but, as Professor Corbin states, "it may be a question that should be answered by the judge rather than by the jury."[18] Although in a Commission adjudication, there is no jury, the theoretical assignment of the issues as they might be assigned in court is useful in determining when it is appropriate for the Commission to decide issues without trial.

As Professor Corbin has observed, "in very many cases where the contract is in writing the interpretation of its language has [19] been held to be for the court and not for the jury."[19] The law is clear that the court may undertake the interpretation of a written contract without a trial if the contract language is both undisputed and unambiguous.[20] Where it can be determined that the "historical" facts concerning a written contract are not substantially in question—that is, that the words of the instrument are "definite and undisputed"[21] —the next question is whether the meaning of the contract is nonetheless ambiguous. The existence of ambiguity is a question of law to be decided by the court.[22] The court may properly determine that an instrument is unambiguous notwithstanding that the parties do not agree on the construction of the contract, that a party has [20]

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[17] Schwarzer, at 473. *See also* Note, *Factors Affecting the Grant or Denial of Summary Judgment*, 48 Colum. L. Rev. 780 (1948).

[18] 3 A. Corbin, *A Treatise on the Law of Contracts*, § 554 at 220–21 (1960) (hereafter "Corbin").

[19] *Id.* at 225 (footnotes omitted). *See also* note 13, *supra;* Restatement (Second) of Contracts (hereafter "Restatement") Section 212 comment d (1979).

[20] *See Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 940 (2d Cir. 1980).

[21] Corbin § 554 at 224.

[22] C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2730.1 at 279 (2d ed. 1983) (hereafter "Wright, Miller & Kane"). *See, e.g., Gomez v. American Elec. Power Service Corp.*, 726 F.2d 649, 651 (10th Cir. 1984); *Scott Paper Co. v. Taslog, Inc.*, 638 F.2d 790, 796 (5th Cir. Unit B 1981); *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967). *See also, e.g., Amrep Corp.*, 102 F.T.C. 1362, 1663–64 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert denied*, 106 S.Ct. 1167 (1986); *Horizon Corp.*, 97 F.T.C. 464, 842–46 (1981).

asserted that the contract is ambiguous[23] or that the parties have introduced extrinsic evidence bearing on intent.[24] If the court concludes that no reasonable ambiguity exists, it may proceed without trial to interpretation or construction of the contract.[25]

We conclude, as explained below, that summary decision is proper in this case.

II. ORKIN'S CONTRACTS

At the outset, we consider whether we properly may rely on the contract terms alone or whether it is necessary to consider extrinsic evidence to ascertain the meaning of the contract. Although, under some circumstances, examination of extrinsic evidence might be indicated, such an examination need not be undertaken where the contracts at issue are integrated documents, that is, they embody the complete and final agreement between the [21] parties.[26] According to the *Restatement,* one of the principal effects of a binding integrated agreement is "to focus interpretation on the meaning of the terms embodied in the writing."[27] The pre–1975 contracts contain integration clauses stating clearly that Orkin considered the materials listed in those clauses (the contract, the graph and specification sheets and, upon issuance, the guarantee) to constitute the entire agreement between the parties and that no other understandings or representations were intended to be part of the agreement.[28] We therefore look solely to the contract documents to ascertain their meaning.

Having focused on the terms of the pre–1975 contracts, we conclude that they are unambiguous. It is undisputed that they [22] refer to "lifetime" services and guarantees. They specify an annual renewal fee, and they contain no language that suggests in any way that the renewal fee may change during the lifetime of the treated structure

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[23] *Freeman v. Continental Gin Co.*, 381 F.2d 459, 465 (5th Cir. 1967).

[24] *Scott Paper Co. v. Taslog, Inc.*, 638 F.2d 790, 796 n.4 (5th Cir. 1981).

[25] *See, e.g., Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936 (2d Cir. 1980); *Parish v. Howard*, 459 F.2d 616 (8th Cir. 1972); *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967). Although some commentaries draw a distinction between "interpretation" and "construction" of contracts, the terms are "generally regarded as synonyms and used interchangeably." *See, e.g.*, 4 S. Williston, *A Treatise on the Law of Contracts*, § 602 at 320 [footnote omitted] (3d ed. 1961) (hereafter "Williston").

[26] Even contracts purporting on their face to be integrated instruments, under some circumstances, may be shown to depend on prior agreements between the parties necessitating consideration of those agreements. Here, however, the record contains no evidence of any prior agreements, and we may rely on the integration clauses. Nor is this a case in which the integration clause itself is at issue under Section 5. *See Amrep Corp.*, 102 F.T.C. 1362, 1667–68 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1167 (1986); *Horizon Corp.*, 97 F.T.C. 464, 847 (1981).

[27] Restatement, Ch. 9, Topic 3 at 114.

[28] Orkin has made no showing of intent outside the corners of the contracts except by way of *post hoc* rationalization and unsupported assertions. These are insufficient to meet the company's obligations under Rule 3.24(a)(3) "to set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. 3.24(a)(3) (1986). *See also* J. Moore & J. Wicker, *Federal Practice* ¶56.17[11] at 56–778 through 56–779 (2d ed. 1985) (hereafter Moore & Wicker); *Worth v. Orkin Exterminating Co.*, 142 Ga. App. 59, 60, 234 S.E.2d 802 (1977) (upholding Orkin's refusal to give effect to an oral contract alleged by a customer because "provisions of the written contract clearly contravene such action" and "parties are bound only by the terms of the written agreement").

or that the duration of the stated renewal fee is different from the "lifetime" duration of the guarantee, assuming timely annual payments. The contracts provide expressly for fee adjustments in circumstances involving extension of the guarantee where the treated premises have been structurally modified. This express provision for certain adjustments makes the absence of language anticipating other adjustments even more significant. Orkin would not have needed to provide expressly for fee increases in the context of structural modification had the company intended such fee increases to be permissible generally. The fact that the contracts Orkin used before 1966 and after 1975 contain express language permitting renewal fee increases regardless of whether structural modification occurred[29] also strongly suggests that the contracts at issue are properly read to provide for a fixed renewal fee. Orkin specifically deleted the clause that permitted general fee increases when it began offering lifetime guarantees, and it specifically added the clause again in February, 1975.

The lifetime guarantee is a major feature of the pre–1975 contracts that consumers were unlikely to overlook. The first page of the pre–1975 contract contains a series of guarantee options, such as "Lifetime Control and Repair," "Lifetime [23] Control" or "Control Only," from which the customer could choose. Each option is accompanied by a check-off box for recording the appropriate choice. In choosing a lifetime guarantee from the available options, the customer necessarily had to focus on the term. Also on the first page, as shown in the examples quoted above,[30] the description of the renewal fee provision often contains a blank space into which the term of the renewable guarantee was handwritten, once more focusing the customer's attention on the lifetime guarantee. On the second page of the contract, the word "lifetime" again appears prominently, this time in the description of the guarantee. In this context, it is generally found in bold print, capital letters or both, often with the entire description enclosed in a box setting it off from the rest of the material on the page.

Orkin, although conceding the language of the contracts, argues that they are ambiguous and that extrinsic evidence will reveal factual issues that make summary decision improper. When the language of a contract is unambiguous,

> the operation of the parol evidence rule will preclude the introduction of outside evidence to dispute its terms and summary judgment is particularly appropriate.[31]

[29] *See supra* note 3.

[30] *See supra* p.6.

[31] Wright, Miller & Kane § 2730.1 at 282. *Accord*, Moore & Wicker ¶56.17[11] at 56–779; *see Sullivan v. Massachusetts Mut. Life Ins. Co.*, 611 F.2d 261, 264 (9th Cir. 1979).

Having found, as a matter of law, that the contracts are integrated agreements that are not ambiguous, we need not review extrinsic evidence. Although we believe the meaning of the [24] contracts is clear, we have examined the entire summary decision record to ascertain whether it reveals genuinely disputed issues of material fact as Orkin has alleged. We find none. Indeed, to the extent that extrinsic evidence in the record is reliable and probative, it supports our conclusions based on the contracts themselves.

Orkin argues that the contracts are silent regarding the length of time that the renewal fee will remain at the stated level and that the Commission must give weight to extrinsic evidence concerning the parties' intentions. Orkin notes the testimony of its vice president, Earl Geiger, that "[n]o one at Orkin who participated in the decision to offer a 'lifetime' guarantee intended or even contemplated that the initially stated annual renewal rate would never be increased for the lifetime of the guarantees."[32] But subjective, uncommunicated intent is not relevant to the interpretation of a contract. As the courts have made clear: [25]

> It is well-established that intent is relevant to proper interpretation of a contract only if it is expressed by one party to the other, not if it be kept secret.[33]

Based on Mr. Geiger's testimony, Orkin asserts that its contracts should be construed in two isolated "segments": the lifetime guarantee and the annual renewal option with its provision for a fee. Orkin contends that the second segment does not expressly state for how long the customer may continue to opt for annual renewals at the stated renewal fee. Therefore, the argument goes, this part of the agreement constitutes a perpetual contract, enforceable only for a reasonable period of time. This argument necessarily implies that each document that we have treated as a single contract is, in fact, two contracts. Although most of the contracts in the record are more than one page long, they are imprinted at the top, near the name of the company, with the words "Retail Installment Contract."[34] The box indicating that the customer selected a lifetime guarantee is on the same page as the provision for a specified annual renewal payment. The entire page is surrounded by a continuous geometric border of the sort often seen on printed form contracts. The integration

[32] Geiger Aff. ¶6; Geiger Dep. at 38, 40. Orkin also cites the affidavit of Kenneth J. Boudreaux, an economist. Dr. Boudreaux's testimony, however, like that of Mr. Geiger, simply provides a *post hoc* rationale for Orkin's conduct. He states, for example, that "the promise of an indefinitely fixed annual renewal premium would not be economically rational . . . ." The testimony of Dr. Boudreaux may tell us something about Orkin's business acumen, but it tells us precious little about Orkin's intentions. Companies can make decisions that they later regret as having been economically irrational.

[33] *Gollberg v. Bramson Publishing Co.*, 685 F.2d 224, 228 (7th Cir. 1982) (citations omitted). *Accord*, Restatement § 200 comment b; Williston § 606 at 373–75.

[34] *See, e.g.*, CX–9A, 11A, 12A, 13A, 14A and 16A.

clause, most frequently found on the second page, refers to "the complete agreement between the parties."

We see nothing whatsoever on the face of the document to suggest that it is anything other than a single contract, nor has [**26**] Orkin, aside from its conclusory assertion, provided any reason for the artificial distinction it proposes.[35] As we understand it, Orkin's position is simply that, although the agreement refers to a specified fixed fee, the company can raise the fee unilaterally after a reasonable period of time has passed. This argument is no more than a partially obscured articulation of Orkin's apparent belief that the company can read any contract provision out of context if it would be in its interest to do so.

Orkin's argument conveniently overlooks the contracts' use of the term "lifetime"—a term conceded to mean the life of the treated structure. Language making the duration of contractual obligations dependent on an ascertainable fact or event, such as the existence of a particular structure, is sufficient to render the duration of the contract definite and certain. Courts have held that contracts "may be uncertain as to point of time when [they] will terminate, [so long as] there is no uncertainty as to the event which will bring about [their] termination. . . ."[36] A contract "need not state a period" during which obligations may [**27**] be performed provided that "it states that mode by which the length of such period may be determined."[37]

The mere fact that a contractual obligation may extend for a considerable length of time does not undermine the certainty of its duration or make its duration perpetual or indefinite. Orkin's lifetime guarantee is no less definite or ascertainable than a life insurance contract,[38] and, since it does not extend beyond any structural modification, probably no longer. Quite apart from principles of law, common sense and Orkin's own documents belie the notion that the pre–1975 contracts are perpetual.[39]

The Commission, therefore, does not agree that the contracts are silent or indefinite with respect to the period for which the level of the

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[35] Our reading of the contracts is consistent with the rule that "[a] writing is interpreted as a whole and all writings that are part of the same transaction are interpreted together." Restatement § 202(2). *Accord*, A. Corbin, *Corbin on Contracts*, 521 (one volume ed. 1952); *Hill & Range Songs v. Fred Rose Music, Inc.*, 570 F.2d 554 (6th Cir. 1978); *see Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 860–61 (Utah 1978) (rejecting contention that the duration of an assessment for continuation of a water right was severable from the provision of the contract establishing the duration of the water right).

[36] *Fuchs v. United Motor Stage Co.*, 135 Ohio St. 509, 21 N.E.2d 669, 672 (1939); *accord, Pallange v. Mueller*, 206 Wis. 109, 238 N.W. 815 (1931); 17 Am.Jur.2d § 80.

[37] 80 ALR 1454, 1473. *See Phelps v. Shawprint, Inc.*, 238 Mass. 352, 103 N.E.2d 687, 689 (1952); *Fuchs Motor Stage Co.*, 21 N.E.2d at 672; *Pallange*, 238 N.W. at 816.

[38] *See generally* Appleman, *Insurance Law and Practice*, §§ 101–112 (1981). *See also Burnet v. Wells*, 289 U.S. 670, 679 (1933), *quoting New York Life Insurance Co. v. Statham*, 93 U.S. 24, 30 (1876) (holding that a life insurance policy " ' is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium.' It is 'an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums.' ")

[39] Houses do not last forever absent structural modification. The number of pre–1975 guarantees in effect will drop naturally through "normal attrition over the years." RX 94C.

stated renewal fee will remain constant.[40] We have concluded that the duration of the lifetime guarantee and the [28] duration of the fixed renewal fee are one and the same. Orkin has not suggested the existence of any prior or contemporaneous evidence (written or oral) that supports Mr. Geiger's assertions to the contrary. Orkin has made no showing that, despite the language of the contracts, it gave its customers any reason to think that the duration of the level of the renewal fee might differ from the duration of the guarantee itself.[41]

To the extent that the record contains credible and reliable extrinsic evidence, it shows that a fixed renewal fee was intended. The only extrinsic evidence of a contemporaneous representation is the Orkin 12 advertising campaign, which boasts of a yearly premium that never increases.[42] This constitutes reliable extrinsic evidence of the company's intentions regarding the meaning of its contracts unlike Mr. Geiger's or Dr. Boudreaux's unsupported, *post hoc* assertions. Orkin has not identified any other contemporaneous representation inconsistent with those of the Orkin 12 campaign. Nor is it significant that the Orkin 12 campaign lasted only six months, since there is no suggestion that it made inaccurate representations to consumers.[43] The campaign clearly promoted the lifetime concept articulated in the pre–1975 contracts, and the terminology [29] concerning annual renewal fees in those form contracts remained consistent throughout the pre–1975 period.[44]

Orkin asserts, citing the *Restatement,* that even an integrated contract must be construed " 'in *light of the circumstances*' "[45] or, more specifically, " 'in light of the relevant evidence of the situation and the relations of the parties, . . . usages of trade, and the course of dealings between the parties.' "[46] The relevant evidence shows a standard form contract designed by Orkin to embody an agreement between a commercial establishment and an individual customer not routinely or repeatedly involved in transactions of this nature. The relations of the parties and the likelihood, as reflected by the lifetime guarantee, that its customers dealt with Orkin infrequently, support our reading that Orkin should be held to the terms of the contract as drafted.

Orkin apparently attempts to establish a "usage of trade" by stating that it was "common industry understanding of virtually identical

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[40] The cases Orkin cites in support of its position are not relevant. *See* RAB 23–24, ns.12 and 14. These cases either proceed on the assumption that the contracts at issue were silent or ambiguous with regard to their duration or that reliance on extrinsic evidence is otherwise necessary to determine their meaning.

[41] A standardized form contract drafted by one party generally will be construed against that party. Restatement §§ 206, 211 comment b. *See also Horizon Corp.*, 97 F.T.C. 464, 844 (1981).

[42] *See supra* pp. 7–8.

[43] IDF 27; Geiger Dep. at 29–30, 34–35.

[44] *Compare* RX 3, 6A *and* CX 429A *with* CX 2A, 4A, 9A, 400A, 414A, 421A, 439A, 468A, 473A, 485A, 515A, 520A, 521A *and* 554A.

[45] RRB at 12, *quoting* Restatement § 212(1) (emphasis by Orkin).

[46] *Id.* at 12, *quoting* Restatement § 212(1) comment b.

contract terms"[47] that annual renewal fees could be increased.[48] A "common industry understanding" or "usage of trade" may be relevant in interpreting contracts between members of an industry, their suppliers and customers who engage in [30] frequent transactions in the industry and so, presumptively, have become knowledgable of any specialized terms of art used. The record evidence, viewed most favorably to Orkin, does not show such a common industry understanding. At most it shows that one other firm increased its annual renewal fees on "lifetime" control contracts "even though the contract did not expressly provide for such an increase."[49] The *Restatement* also says that neither party to a contract "is bound by a meaning unless he knows or has reason to know it."[50] Orkin has not shown that its pre–1975 customers knew, or had reason to know, that it was Orkin's practice to increase the fees, much less that such conduct was common in the pest control industry. The fact that [31] many customers acquiesced in the fee increase is not proof that they knew of it in advance or agreed with Orkin's current reading of the contracts.

The cases Orkin cites in support of its argument are not comparable to the case at hand.[51] In *Gollberg v. Bramson Publishing Co.*, 685 F.2d 224, 227–28 (7th Cir. 1982), the court addressed a usage of trade question, but the contracting parties, a publisher and his employee, an advertising space representative, were both involved in the publishing business and could be considered conversant with its practices. The interpretation based on industry usage was also consistent with the language of the contract. Orkin's customers, on the other hand, had no reason to be familiar with industry practice and the usage of trade Orkin suggests is inconsistent with the language of the pre–1975 contracts.

In *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984), one of Tymshare's sales representatives challenged the contract language in the company's "Compensation Plan" regarding sales quota increases.

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[47] RRB at 15, *quoting* Restatement § 212(1) comment b (Orkin's emphasis omitted).

[48] *See generally* Nolen Aff.; RX 661A–D

[49] Nolen Aff. ¶7. A careful reading of the other affidavits on which Orkin relies to demonstrate common practice in the industry shows that they do not support the proposition for which they have been advanced. Each of the contracts appended to those affidavits states that the company may raise or renegotiate its annual renewal fee after a period of years. *See* contracts attached to affidavits of Tindol, Hromada and Nolen. If anything, the contracts of Orkin's competitors tend to emphasize the difference between Orkin's pre–1975 contracts and contracts that permit fee increases and to confirm our reading. We cannot accept RX 661 B–D, a brief memorandum from an attorney in the Georgia Attorney General's Office, as evidence for this proposition either. The memorandum contains a general reference to complaints about fee increases in pest control contracts from homeowners who assumed that the contracts provided for a fixed price and a cursory discussion of the permissibility of such increases. It examines administrative options for addressing the problem, reflects no knowledge of particular contracts, does not address the proper construction of the term "lifetime" except to assume that contracts using it purport on their face "to continue forever," and concludes that it is not appropriate "to advise callers that [the author's] office has previously approved the escalation of . . . annual fees" in lifetime contracts. The document simply does not tell us either that Orkin's particular contracts or its conduct were common or that such conduct was considered acceptable in the industry.

[50] Restatement § 220 comment b.

[51] RAB at 27.

In concluding that the contract language permitted retroactive increases, the court accorded "some weight" to the interpretation Tymshare gave to other employees "as demonstrating the past interpretation of at least one of the parties, and also suggesting the reasonableness of that interpretation since it has been accepted by others."[52] Here, there was no such prior interpretation or acceptance. From 1966 until 1980, Orkin [**32**] accepted the initially specified fee as the appropriate renewal payment. Even assuming that the pre–1975 customers had some common link for communicating with one another, as sales representatives of a particular company do, Orkin's customers had no fee increases to report.

Orkin also cites *Acheson v. Falstaff Brewing Corp.*, 523 F.2d 1327 (9th Cir. 1975), in which the court, in construing a collective bargaining agreement, took into account the language of the agreement, national labor policy "perceived and defined as a matter of federal law,"[53] and state law to the extent it was compatible with federal policies. The court also recognized the "fundamental rule of contract interpretation that great weight should be given the interpretation of the contract by parties thereto."[54] Orkin would have us give weight only to its own latter day interpretation of the pre–1975 contracts rather than the plain language of the instruments. We find Orkin's arguments concerning the circumstances of the situation or usage of trade unsupported by the factual or legal authority it cites.

Although Orkin attempts to suggest that the fee increase was justified because of escalating costs in the early 1970's, it has [**33**] not shown that it was losing money on the pre–1975 contracts.[55] We also note Orkin's objection to the conclusion of the Administrative Law

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[52] *Id.* at 1150.

[53] 523 F.2d at 1329.

[54] *Id.* at 1330.

[55] RAB at 7. We cannot accept the statement in finding 72 in the Initial Decision that Orkin experienced losses on its pre–1975 contracts. Viewing the evidence most favorably to the respondent, we agree that the cost of providing termite renewal services in 1984 exceeded the amount of renewal fees due on the pre–1975 contracts. Orkin presented no evidence, however, showing that it lost money on any single pre–1975 contract or on those contracts as a group if the initial treatment fee is included in the analysis. The initial treatment fee and the renewal premiums should be considered together in ascertaining how much money has been made or lost on an individual contract on a given date. *See, e.g.*, RAB 40, n.21; RPF 93. What Orkin has shown is its general concern about inflation, not its losses on the pre–1975 contracts. In any event, neither inflationary pressures nor demonstrated losses on binding contracts justifies unilateral disregard of the terms of the contracts. Despite its concern with inflation, Orkin showed yearly profits between 1977 and 1984:

June 1977 - $22,428,534
June 1978 - $19,258,821
June 1979 - $17,140,842
June 1980 - $23,744,000 (rounded to thousands)
June 1981 - $27,142,000 (rounded to thousands)
June 1982 - Not in record
June 1983 - $30,127,691
June 1984 - $31,548,071

IDF 6.

Judge that it did not rely in good faith on the advice of counsel.[56] We do not address the question of good faith. Reliance by Orkin's officers or employees on legal advice is not germane to whether the company honored its contract obligations or acted unfairly toward its pre–1975 customers. [34] Such a rule would virtually eliminate a remedy for unfair acts or practices as long as an attorney recommended the conduct.[57]

Orkin has attempted to demonstrate that setting a fixed fee would not have been prudent,[58] that its fee increase was warranted because of inflation,[59] that it was a common practice in the industry to raise fees under these circumstances[60] and that consumers did not consider the question of fee increases important.[61] The material on which Orkin would have the Commission rely is irrelevant because it relates solely to intent not demonstrated to the customer, speculative because it consists of Orkin's unsupported beliefs and assumptions concerning general customer attitudes and expectations, or immaterial because, even assuming its truth and validity, it does not show that the contract permitted a unilateral fee increase.[62] Orkin has presented nothing concrete to suggest the existence of any genuine issue of material fact that would require development at trial. As the Court of Appeals for the First Circuit has said, "[W]hile a [party opposing summary judgment] is entitled to all [35] favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture."[63]

In considering the merits of a motion for summary decision, the Commission must draw all factual inferences against the moving party. Here no factual inferences were necessary.

> [I]n actions involving written contracts the parol evidence rule may so operate that there is no relevant factual issue in dispute, so that summary judgment may be rendered . . . under applicable principles of contract law."[64]

The Commission has interpreted the pre–1975 contracts through a reading of undisputed contract language with reference to applicable principles of contract law. We conclude, as did Judge Barnes, that the

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[56] RAB at 11 n.7.

[57] *See Gregg v. Chauffeurs, Teamsters and Helpers Local 150*, 699 F.2d 1015, 1017 (9th Cir. 1983).

[58] RAB at 26.

[59] RAB at 18.

[60] *Id.* at 25.

[61] *Id.* at 27.

[62] *See* note 48 *supra*.

[63] *Manganaro v. Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1962). *See also, e.g., Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.* 106 S.Ct. 1348, 1356 (1986) ("opponent must do more than simply show that there is some metaphysical doubt as to the material facts"); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986); *Exxon Corp. v. FTC*, 663 F.2d 120, 126–27 (D.C. Cir. 1980); *Marks v. United States Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978).

[64] Moore & Wicker, ¶56.17[11] at 56–785.

"only logical interpretation of the Orkin 'pre–1975' contracts is that the company has contracted to provide lifetime protection for treated premises for a fixed annual renewal fee."[65]

III. SCOPE OF SECTION 5

Section 5 declares unlawful "unfair or deceptive acts or practices in or affecting commerce." Orkin contends that a [36] breach of contract not alleged to be deceptive may not constitute an unfair act or practice in or affecting commerce. We conclude that it may.

Plainly, a breach of contract or a systematic program to breach numerous contracts constitutes an "act or practice" under Section 5. The remaining question is whether such an act or practice is unfair.[66] Congress left to the Commission the responsibility to determine what particular acts and practices are unfair within the meaning of the statute and provided no exceptions for conduct related to contractual obligations. As we will discuss in Section IV, the Commission has determined that to be "unfair" under Section 5, an act or practice must result in substantial and unavoidable consumer injury that is not outweighed by benefits to consumers or to competition. Some consumer injury is inherent in any failure by a seller of goods or services to deliver according to the terms of a contract. The Commission will examine case by case whether the injury caused by a particular refusal to honor a contract obligation was avoidable, whether the injury is sufficiently substantial, either by its nature or its prevalence, to meet the Commission's [37] standard of "unfairness," and whether the injury is outweighed by benefits to consumers or to competition.

Orkin suggests that the Commission's interpretation of its unfairness jurisdiction should be guided by court decisions construing breach of contract under state "little FTC Acts," which, like Section 5, prohibit unfair acts or practices. The courts have read these state laws not to reach simple breach of contract. The Commission is not bound to follow judicial interpretations of state "little FTC Acts" in construing Section 5. It can restrain unfair business practices in interstate commerce "even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is

[65] I.D. at 59–60. *See* State *ex rel. Guste v. Orkin Exterminating Co.*, No. 83–2166 (Dist. Ct. La., Orleans Parish, Feb. 25, 1986) (holding Orkin liable for breach of its pre–1975 contracts based on the fee increase, having found that the lifetime term of the guarantee and its fixed renewal premium were definite and enforceable).

[66] The Commission has previously found liability under Section 5 on an unfairness theory for conduct inconsistent with the contractual obligations of various respondents. *See, e.g., Jay Norris Corp.*, 91 F.T.C. 751, 848 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) (retention of customer payments without performing the bargained for prompt delivery of merchandise); *Skylark Originals, Inc.*, 80 F.T.C. 337, 350–51 (1972), *aff'd*, 475 F.2d 1396 (3d Cir. 1973) (failure promptly to honor money-back guarantee as represented in advertisements and catalogs).

authorized by state law."[67] Although the state cases are not controlling, we would consider their reasoning if those cases more closely paralleled the case before us. They do not.

The state court decisions Orkin cites stand for the proposition that private controversies arising out of simple breaches of contract under certain state statutes do not violate those statutes.[68] This case is not a dispute between private parties. The requirement under Section 5 that the Commission determine that an enforcement action is in the public interest [38] provides an essential feature missing in private actions brought under state laws. The Commission has made that determination here. Unlike the conduct in Orkin's state law cases, the conduct at issue in this proceeding is not the breach of a single contract but is rather a widespread, systematic program Orkin implemented to effect a unilateral modification of its own standard contract terms agreed to by many thousands of consumers.[69] Under the state statutes construed in the cases Orkin cites, the relief also differs fundamentally from that permitted under Section 5. The state laws, unlike the federal statute, at least in some instances, provide for imposition of treble damages in private actions where violations are found.[70] Neither Section 5 generally nor the complaint in this proceeding seeks monetary damages.

We need not and do not find that every breach of contract subjects the breaching party to liability under Section 5. We simply conclude that the conduct at issue here falls within the scope of the Commission's authority under that statute.

IV. LIABILITY UNDER SECTION 5

Having found that Orkin's pre–1975 contracts provided for a fixed annual renewal fee for the life of the treated structure, we turn to the question whether Orkin's conduct in unilaterally raising the fees is an unfair act or practice in violation of [39] Section 5. Again we must consider the threshhold question whether summary decision is proper.[71] On the basis of undisputed facts in the summary decision record, the Commission concludes that summary decision is appropriate and that Orkin's increase of the annual renewal fees on its pre–1975 contracts constituted an unfair act or practice under Section 5.

A finding of substantial unjustified consumer injury is essential to

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[67] *Peerless Products v. FTC*, 284 F.2d 825, 827 (7th Cir.), *cert. denied*, 365 U.S. 844 (1960). *Accord, Spiegel, Inc. v. FTC*, 540 F.2d 287, 292–93 (7th Cir. 1976).

[68] *See, e.g., Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, 754 F.2d 10 (1st Cir. 1985); *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir.) *cert. denied*, 454 U.S. 1054 (1981).

[69] *See supra* p. 11.

[70] *See, e.g.*, N.C. Gen. Stat. §§ 75–1.1(a), 75–16 (1985); Mass. Gen. Laws Ann. Ch. 93A, §§ 2(a), (11) (West 1984). *See also, e.g., Marshall v. Miller*, 276 S.E.2d 397 (N.C. 1981); *Pepsi-Cola Metro Bottling Co. v. Checkers, Inc.*, 754 F.2d 10 (1st Cir. 1985).

[71] *See supra* pp. 14–16.

a conclusion that a business act or practice is unfair under Section 5. *Horizon Corp.*, 97 F.T.C. 464, 847 (1981). In considering whether conduct is unlawful as an unfair act or practice, the Commission will consider whether the consumer injury is: (1) substantial; (2) not outweighed by an offsetting consumer or competitive benefits that the practice produces; and (3) one that consumers could not reasonably have avoided. *International Harvester Co.* 104 F.T.C. 949, 1061 (1984); *Amrep Corp.*, 102 F.T.C. 1362, 1669 (1983); *Horizon Corp., supra*, 97 F.T.C. at 849–50.[72] **[40]**

The Commission finds that Orkin's failure to honor some 207,000 pre–1975 contracts caused actual and substantial harm to consumers.[73] The harm resulting from Orkin's conduct consists of increased costs for services previously bargained for and includes the intangible loss of the certainty of the fixed price term in the contract. The breach also injured the market more generally by undermining consumers' ability to rely on the terms of fully integrated, standard form contracts used by businesses to simplify and facilitate routine transactions.

Although the financial injury to each individual customer is relatively small if measured on a yearly basis, Orkin's fee increase was not for just one year. Repeated payment of the higher yearly fee imposes a continuing and cumulative monetary burden on the consumer over the period of the contract. As Orkin's figures show, the fee increases affected some 207,000 customers. We are not concerned with trivial or merely speculative harms, but an injury may be substantial if it does a small harm to a large number of people.[74] Over $7.5 million in increased renewal revenue in an approximately four year period,[75] at the unjustified expense of consumers, is not insubstantial. **[41]**

The Commission does not accept Orkin's apparent belief that it could alter the contract obligations unilaterally on the ground that they were of only "peripheral" concern to the other party at the time the contract was signed. The undisputed facts show that the level of the annual fee was of more than peripheral concern to consumers. It is true that evidence in the summary decision record suggests that some of Orkin's customers did not consider the guarantee or the level of the annual renewal fee to be a factor, or an important factor, in

[72] *See also FTC v. Sperry & Hutchinson Co.* 405 U.S. 233, 244–45 n.5 (1972); *Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction*, letter from the FTC to Senators Ford and Danforth, December 17, 1980 ("Unfairness Statement"), reprinted at Trade Reg. Rep. (CCH), Transfer Binder, Current Comment 1969–1983 ¶50,421 at 55,948.

[73] Unfairness cases, unlike deception cases, which focus on likely injury, usually involve actual and completed harms. *International Harvester Co.*, 104 F.T.C. at 1061.

[74] Unfairness Statement at 55,948 n.12. *See also International Harvester Co.*, 104 F.T.C. at 1064 n.55.

[75] IDF 46, 65 and I.D. at 70.

their decision to contract with Orkin.[76] This does not undercut our finding of consumer injury. As the Court of Appeals for the Seventh Circuit observed in *Basic Books, Inc. v. FTC*, 276 F.2d 718, 721 (7th Cir. 1960):

> The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them.

The large number of pre–1975 customers who objected to the company's fee increase amply shows that a great many customers believed the level of the renewal fee was of substantial [**42**] importance.[77] Even if some of Orkin's customers would have chosen to deal with Orkin rather than its competitors, with or without the promise of a lifetime guarantee, we need not find, for purposes of determining liability, that every consumer who could have been injured was, in fact, injured. We need only find that actual, substantial consumer injury resulted from the company's failure to honor its contracts.

Orkin asserts that there are genuine issues of material fact that cannot be resolved on the existing record regarding the extent to which consumers actually relied on a fixed fee and whether they "bargained" for a fixed fee. The materiality of a contract term need not be shown through evidence of negotiation between the parties. The Commission has presumed that all express claims are material and it also has presumed the [**43**] materiality of implied claims concerning cost.[78] We are dealing with express contract terms regarding cost.

The law creates a presumption that the signatories to an integrated

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[76] Trahant Dep. at 32; Albertson Aff. ¶7; Ashcraft Aff. ¶7; Hoffman Dep. at 27–28; Thompson Dep. at 22; and Terrebonne Dep. at 21. *But see* Duley Dep. at record 2316. None of these affidavits provides evidence of consumer intent contemporaneous to execution of the contract.

[77] Orkin admits to a rate of complaints lodged by its pre–1975 customers of approximately 1–2% (RX 73 and G. Rollins Dep. p.119). Its figures show that almost 6000 customers actively sought and were granted relief from the fee increase. IDF 67. *See also* IDF 51. Its estimate is conservative. Its figure does not count customers with contracts signed in 1968 whose fees were unilaterally rolled back because they were patently inconsistent with the Orkin 12 advertising campaign. It does not include complaints made to state agencies rather than to Orkin. It does not include customers who, although perhaps unhappy with the increase, acquiesced without complaining or without complaining with sufficient vigor to secure a roll back. Nor does it account for some percentage of the approximately 42,600 customers who cancelled their contracts after the fee increase, some or many of whom may have done so because of the increase.

[78] *International Harvester Co.*, 104 F.T.C. at 1057. *See also, e.g., MacMillan Inc.*, 96 F.T.C. 208, 303–304 (1980)(nondisclosure of facts needed to permit calculation of cost found to be omission of material information); *Peacock Buick*, 86 F.T.C. 1531, 1562 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977)(nondisclosure of added service charge to price of car found to be a material omission); letter from Federal Trade Commission to Congressman John Dingell (Oct. 14, 1983), reproduced as an appendix to Commission Decision and Order in *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174–183 at 182–83 and n.55. Although the presumption in *International Harvester* was stated, as it most often is, in the context of alleged deception rather than alleged unfairness, the concept of materiality is the same in either situation. As the Commission said in *International Harvester*, "The unfairness theory . . . is the Commission's general law of consumer protection, for which deception is one specific but particularly important application." 104 F.T.C. at 1064.

contract relied on the terms of the instrument rather than outside understandings.[79] As Judge Barnes said:

> After making a contract, consumers are entitled to receive everything contracted for, whether it was the primary inducement or secondary inducement in the agreement. Any determination to permit only partial compliance with a contract, or to require performance of only the primary benefits of the contracts, would make a mockery of contract law and consumer protection.

Where the contracts in question are not only integrated but are also standardized form instruments, we do not find it necessary to examine whether consumers actually negotiated over particular terms in order to conclude that those terms are material to the "bargain" embodied in the agreement. We conclude that no genuine issue of material fact exists concerning reliance on or bargaining for a fixed annual renewal fee. A principal reason [**44**] for using a standard form contract is to eliminate "bargaining" over terms in agreements intended for mass use. Standardization saves time and money and leaves the parties free to "focus on meaningful choice among a limited number of significant features,"[80] such as, in these contracts, the type of guarantee and the amount of the initial treatment and annual renewal fees.

We turn now to whether this substantial consumer injury is "harmful in its net effects."[81] As the Commission explained in *International Harvester*, conduct can create a mixture of both beneficial and adverse consequences.[82] Our task is to balance these consequences. Orkin did not purport to offer its customers anything new when it raised the annual renewal fees. The increase in the fee was not accompanied by an increase in the level of service provided or an enhancement of its quality. The action apparently was intended to enable the company to compensate for its rising costs, costs that Orkin claims it had not anticipated at the time it entered into the pre–1975 contracts.[83] By raising the fees, Orkin unilaterally shifted the risk of inflation that it had assumed under the pre–1975 contracts to its pre–1975 customers who lost the benefit of a fixed annual renewal fee. As Judge Barnes concluded, "[a]ll that [**45**] customers have received from the increase in annual renewal fees is the additional burden of paying more for Orkin's services than they had originally agreed upon."[84]

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[79] *See* Restatement Ch.9, Topic 3 at 114.

[80] Restatement § 211 comment a.

[81] *International Harvester Co.*, 104 F.T.C. at 1061.

[82] *Id.*

[83] RAB at 6; RPF 14. As noted already (*see supra* note 54), Orkin has not shown actual losses on the pre–1975 contracts.

[84] I.D. at 75.

Nor did raising the annual renewal fee for these consumers result in benefits to competition. Information concerning the availability, nature and prices of products and services plays an indispensable role in the allocation of resources in a free enterprise system.[85] In a competitive market, one may assume that consumers will choose the seller who offers the lowest price for a given level of quality. Normally, in such a market, the seller with the lowest price has the lowest cost per unit and is the most efficient. The market rewards the efficient seller to the ultimate benefit of consumers.

The market forces that reward efficient competitors would be impaired if a seller is allowed to gain a competitive edge by unilaterally changing the bargains it has made. Orkin's refusal to perform as promised under its contracts threatens the integrity of contracts and reduces the reliability of price information available to consumers in making their purchase decisions.

Orkin argues that these conclusions are erroneous and that an order precluding fee increases on the pre–1975 contracts and requiring a roll back of the fee increase already in effect would have adverse effects on its entire customer base and on many of [**46**] its competitors.[86] Orkin claims that such an order would impose the full burden of inflation on customers who entered into their contracts after February 1975. This argument does not change our view. Under the pre–1975 contracts, Orkin assumed the risk of inflation. Orkin reassigned the risk to the customer in the contracts it issued after February 1975 that expressly allowed fee increases not conditioned on structural modification of the treated premises. The post–1975, unlike the pre–1975, customer contracted for the risk.[87]

Orkin appears to make two arguments concerning harm to its competitors. First, the company argues that an adverse ruling would "jeopardize" past fee increases imposed by its competitors and could endanger their survival.[88] Second, as we understand it, Orkin argues that competition will suffer if the renewal fees on the pre–1975 contracts are returned to their initial level, because lower fees would discourage or prevent customers holding those contracts from transferring their business to the respondent's competitors.[89] We fail to see why either argument is relevant to whether Orkin's fee increase violates Section 5. [**47**] Orkin's competitors are not before us, and we

[85] *See Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1972).

[86] RAB at 45.

[87] It is less than clear that if compelled to roll back the fee increase on the pre–1975 contracts, Orkin would raise the fees on contracts entered into after February 1975. Presumably, the prices on those contracts were set to maximize profit and minimize the loss of customers to competing firms. In an industry that, as Orkin concedes, is fragmented and competitive, fee increases on the post–1975 contracts might be unprofitable, because they could drive away customers to firms selling at competitive levels.

[88] RAB at 47.

[89] RAB at 47.

neither know nor have reason to know the nature of their contractual obligations or the manner in which they have fulfilled them. Even assuming the validity of Orkin's factual assertions, any wrongdoing of other firms would not excuse unlawful conduct by Orkin. The second argument is perhaps even less persuasive. Indeed, the argument implicitly concedes that the pre–1975 customers do in fact know and appreciate the benefit of their bargain with Orkin. A fee roll-back would simply reestablish the original bargain. That competitors might thrive if a respondent is permitted to flout accepted standards of commerce is not a benefit to competition cognizable in an analysis of unfairness under Section 5. We conclude that the injury to consumers and to competition resulting from Orkin's increase of the annual renewal fees on its pre–1975 contracts is not outweighed by countervailing benefits.

The next question is whether Orkin's pre–1975 customers reasonably could have avoided the injury they suffered from the increase of their annual renewal fees "through the exercise of consumer choice."[90] Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end. As the Commission said in *International Harvester:* [48]

> Whether some consequence is 'reasonably avoidable' depends not just on whether people know the physical steps to take in order to prevent it, but also on whether they understand the necessity of actually taking those steps.[91]

The Commission has determined that neither anticipatory avoidance nor subsequent mitigation was reasonably possible for Orkin's pre–1975 customers.

It cannot be argued seriously that consumers reasonably could have avoided the injury resulting from Orkin's renewal fee increase before it became effective. The pre–1975 contracts provided consumers no notice nor even a reason to suspect that the company might raise the annual renewal fee at will. The respondent used standard form contracts expressly permitting Orkin to increase the annual renewal fee only under specifically limited circumstances and stating clearly that only those terms contained in the contract were part of the agreement between the parties. Orkin's customers and, for that matter, its sales force were powerless to modify the form contract. Modifications could be made only by a corporate officer under the corporate seal.

Nor, generally, could consumers effectively have mitigated the

[90] *International Harvester Co.*, 104 F.T.C. at 1061.

[91] *Id.* at 1066.

damage they sustained from Orkin's action after the fact. Orkin did not notify its pre–1975 customers that it would consider exceptions to the fee increase. Orkin granted exceptions only to those customers who complained and demonstrated to Orkin's satisfaction that they had specifically relied on express claims that the annual renewal fee would be fixed for the lifetime of the treated structure. Orkin's [**49**] accommodation program was only a limited response to expressions of customer outrage. The program was not designed to accommodate all customers but rather to control any particularly strong adverse consumer reaction and to minimize any consequent loss of customers and good will. Indeed, it would have been pointless for Orkin to effectuate the fee increase and, simultaneously, to notify its customers that if they preferred not to pay the higher amount, they need not do so.

Orkin asserts that customers with pre–1975 contracts could have refused to pay the increased renewal fee and transferred their business to one of Orkin's competitors that would have assumed the obligations contained in the Orkin pre–1975 contracts for the original renewal fee price or "for less than the levels to which Orkin raised these fees in 1980."[92] The representations of Orkin's own President, Gary Rollins, belie the validity of this argument. Mr. Rollins testified that he "would doubt" that a competing company would do that for a customer.[93] The record evidence is not inconsistent. Even viewed in the light most favorable to Orkin, the evidence does not show that Orkin's competitors assumed or would have assumed the obligations of Orkin's pre–1975 contracts without imposing conditions that would have resulted in additional costs to Orkin's customers,[94] nor does it show that they would not subsequently have increased their annual fees. The competitors' contracts that Orkin has [**50**] presented all provide for increasing the annual renewal fee after a period of time ranging from four to six years.[95] None of the competitors says, and we see no reason to suppose, that he would grant more favorable treatment to customers who previously had contracted with Orkin than to his other customers who had not.

Even if customers could transfer their contract to another firm, that might not be satisfactory. Orkin represents that it is the "world's largest termite and pest control company"[96] and that customers "generally contacted Orkin because of its reputation, stature in the industry, and length of time in business."[97] These claims are borne out by

[92] RAB at 44.

[93] Rollins Dep. at 210; IDF 71.

[94] *See supra*, pages 11–12 and note 7.

[95] Hromada Aff., Exs. A and B.

[96] IDF 4 and citations to record therein.

[97] RAB at 39; *see also* RAB at 5 RPF 6, 92; Raymond Dep. at 150; Tindol Aff. ¶4; IDF 11; IDF 32–33 (promotional language stressing advantages of doing business with Orkin).

several of the consumer affidavits presented by Orkin.[98] The assertion that customers could have mitigated the injury they sustained from the respondent's fee increase by switching to a competing firm does not account for the harm inherent in compelling those customers to deal with a smaller company of lesser stature and repute than Orkin. Nor does it account for the transaction costs to customers faced with the need to search for a reliable or reputable firm willing to provide the same services on the same terms as those in Orkin's pre–1975 contracts and to complete a new agreement with that firm. The Supreme Court noted long ago **[51]** that "the public is entitled to get what it chooses,"[99] a principle that applies to services as well as goods. The Court has said:

> If consumers . . . prefer to purchase a given article because it was made by a particular manufacturer . . ., they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good but having a different origin.[100]

The Commission finds that the respondent's pre–1975 customers could not reasonably have avoided or mitigated the injury that they sustained as a result of Orkin's increase of their annual renewal fee, and it concludes that the respondent's increase of the annual renewal fee on its pre–1975 contracts constituted an unfair act or practice in violation of Section 5.

The Order

We have concluded that Orkin's actions to increase the renewal fees in its pre–1975 contracts constitute unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, and we hereby enter an order to prevent the recurrence of the violation. As required, the order is reasonably related to the violation found to exist.[101] **[52]**

The order in this case requires Orkin to cease and desist from the acts and practices described above. This requirement results in a roll back, as of the effective date of the order, of the annual renewal fees on all of Orkin's pre–1975 contracts. Under the order, Orkin may seek modification or novation of its pre–1975 contracts, but only after a two-year moratorium on any such efforts. The order also requires Orkin to send a letter notifying all its customers holding currently effective pre–1975 contracts of the Commission's order and of the roll back of their annual renewal fees.

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[98] *See, e.g.*, Adams Aff. ¶4; Albertson Aff. ¶4.

[99] *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

[100] *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933); *accord, Pep Boys—Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941).

[101] *See, e.g., FTC v. National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946).

I. ROUTINE PROVISIONS

Several sections of the order require little explanation or discussion. The introductory portion of the order contains definitions, and Parts III–VI contain routine provisions mandating distribution of the order throughout Orkin's corporate structure, the filing of initial and supplemental compliance reports and notification of the Commission of any changes in that corporate structure. Parts I and II detail more substantive obligations.

II. ROLL BACK OF ANNUAL RENEWAL FEE

Part I of the order requires Orkin to cease and desist from the acts and practices the Commission has found unlawful and requires that, as of the effective date of the order, the company roll back the annual renewal fee on the pre–1975 contracts to their level prior to the 1980 fee increase. Orkin contends that an order should require a fee roll back, if at all, only with respect to pre–1975 customers who believed in good faith that their annual fee could not be increased under their contracts. [**53**] Like its argument on the merits, Orkin's position here is simply an attempt to impose on its customers the burden of demonstrating that the company's imposition of higher fees resulted in consumer injury. Such a demonstration is not required. A judgment that consumers sustained injury as a result of Orkin's fee increase is inherent in the Commission's conclusion that the fee increase constituted an unfair act or practice under Section 5.[102]

Orkin's suggestion that any roll back in the order be limited to pre–1975 contracts where there was a "meeting of the minds" on a fixed annual renewal rate is just another way of arguing that only customers who "believed in good faith" that the fee was fixed should be afforded a roll back. As explained earlier,[103] in the context of an integrated, standard form contract drafted by the company, customers are entitled to performance of all aspects of the agreement. We do not accept Orkin's position that some of the obligations in the agreement were expendable.

III. NOTICE LETTER

Under Part II of the order, Orkin must notify each of its customers holding currently effective pre–1975 contracts of the roll back of the 1980 fee increase, except those pre–1975 customers whose fee increases have already been rolled back. The Commission has modified the language of the notice letter and finds Orkin's proposed alternative letter and questionnaire [**54**] inappropriate. The questionnaire is

[102] *See* pp. 37–51, *supra*, for further discussion of consumer injury in this matter.

[103] *Supra* at pp. 40-41 and 50.

particularly objectionable because it would permit the company once more to make the pre–1975 customers "prove" that they were injured by the unilateral fee increase that we have determined constituted an unfair practice under Section 5.

IV. MORATORIUM ON NOVATIONS AND PRIOR COMMISSION APPROVAL

The *proviso* clauses following Part I–E of the order permit Orkin to seek modification or novation of its pre–1975 contracts, but the company may initiate no such attempt until any customer from whom such a modification or novation is to be sought has made at least two annual payments at the annual fee specified in the pre–1975 contract or guarantee. The Administrative Law Judge's order specified, in addition, that the respondent would be required to obtain prior Commission approval of "each and every document or representation which respondent may use or make in any attempt to seek a modification or novation."

We are not persuaded by Orkin that a two-payment moratorium is unduly burdensome, and we believe that it adds a needed measure of stability for the affected consumers that will reduce the likelihood of confusion when, and if, Orkin seeks to modify the contracts. On the other hand, we have decided that, in light of the other restrictions in the order, we need not include the requirement for prior Commission approval of documents Orkin might use in seeking to modify the contracts. Such a provision could impose an unnecessary restriction on the company and places an unwarranted administrative burden on the Commission's time and resources. **[55]**

Instead of including this requirement, we order the respondent to include in the compliance reports required under Part V of the order documents showing all representations made (whether oral or written) in any attempt to seek modification or novation during the period covered by the report. We also order the respondent to include in the compliance reports copies of contracts that have been modified or subjected to novation as a result of its efforts. The order also requires Orkin to include in its compliance reports the names and addresses of any holder of a pre–1975 contract or guarantee with whom it has communicated concerning modification or novation during the period covered by the report. With the inclusion of these materials, we believe that the compliance reports will provide a sufficient basis on which to monitor effectively the company's compliance with the order without the need to burden either the company or the agency with a prior approval provision.

V. CONSUMER REDRESS AND REINSTATEMENT OF CANCELLED CONTRACTS

Notwithstanding its order of November 13, 1985, directing the parties to brief the question whether consumer redress should be ordered in this case if the respondent were found liable under Section 5 and the briefs filed pursuant to that order, the Commission has decided not to address that issue in this proceeding.

The Commission also declines to impose the additional relief sought by complaint counsel that would require Orkin to offer to reinstate the contracts of all the pre–1975 customers who have cancelled their contracts since the 1980 fee increase or at least **[56]** those customers who cancelled during the first year after the increase. Complaint counsel suggest that the failure to include a requirement that Orkin offer to reinstate the contracts of pre–1975 customers who cancelled after the fee increase may have adverse implications.[104] This may be true, and, had this matter gone to trial, we might have imposed the relief that they request. We are not persuaded, however, that the evidence in the summary decision record warrants imposing on Orkin the burden of offering to reinstate contracts cancelled after August, 1980, that may or may not have been cancelled as a result of the fee increase. Although the Commission could remand the matter to the Administrative Law Judge for trial on this limited issue, we have decided that a remand would not serve the public interest at this time.

Conclusion

In addition to the factual findings embodied in this decision, the Commission adopts the findings of fact included in the Initial Decision except to the extent that they are inconsistent with this opinion. On the basis of these facts, for the reasons given above, and for the reasons provided by the Administrative Law Judge to the extent they are not inconsistent with this decision, the Commission has determined that Orkin's **[57]** raising of the annual renewal fees on its pre–1975 termite contracts constitutes an unfair act or practice prohibited by Section 5 of the Federal Trade Commission Act. The Commission issues an order including portions of the order contained in the Initial Decision, imposing certain additional requirements and modifying others.

[104] CAB at 19–23. Complaint counsel's supplemental brief argues that our order should not include refunds to consumers who actually paid the increased renewal charges—arguably a less costly and more readily administrable form of relief than reinstatement of customers whose contracts are no longer in force. We find it unnecessary to attempt to reconcile the apparent inconsistency of these positions.

Separate Statement of Chairman Daniel Oliver

I concur in the majority's conclusion that respondent Orkin Exterminating engaged in an unfair practice when it unilaterally raised the contracted-for annual renewal fees in its pre–1975 contracts. I differ from the majority, however, in the application of the Commission's unfairness standard to the facts of this case. I write separately to explain: first, why I believe careful application of the unfairness standards is important; second, the circumstances that warrant the Commission's intervention in such disputes; and third, the way in which I would apply that analysis to the case before us.

I. GUIDANCE OF COMMISSION OPINIONS

The Commission's written opinions do more than reflect the outcome of a particular matter. They should help in the development of workable rules and provide guidance that both explains and demonstrates the reach of the legal principles involved. The Commission's analysis is particularly important in unfairness cases because of the broad ambit of Section 5. It was criticism of the Commission's broad discretion to define practices as legally "unfair" that led to adoption of the Policy Statement on Unfairness in 1980. In that statement, the Commission promised to "construe its jurisdiction in limited, specific, and market-oriented terms" and to define it "with [2] sufficient particularity to answer criticisms that the law is excessively uncertain."[1]

There are a variety of reasons underlying the Commission's desire, and need, to provide as careful an explanation as possible for its conclusions in an unfairness case. First, our opinions provide direction within the Commission. They are the records available for future Commissioners to ascertain why we acted or failed to act under particular circumstances. In addition, they provide counsel to the Commission staff in its case selection criteria and can thus affect the analysis employed in many other circumstances. Application of careful reasoning also aids the Commissioners in ensuring that we exercise our discretion carefully.

Second, the patent limitations on the Commission's ability to detect all law violations suggests that a principal benefit to be gained from a litigated Commission decision is the assistance it provides to businesses attempting to comply with the law. Reliance on the "Commission's discretion not to bring cases that would be unreasonably burdensome . . . gives no comfort to the seller who is endeavoring to comply with the law, since he cannot tell how the Commission will

[1] *Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction*, letter from the FTC to Senators Ford and Danforth, December 17, 1980 ("Unfairness Statement") at 11. Reprinted at Trade Reg. Rep. (CCH, Transfer Binder, Current Comment 1969–1983 Par. 50,421 at 55,948).

exercise its discretion . . ." [3] *International Harvester Co.*, 104 F.T.C. 949, 1060 n.40 (1984). If we do not explicate carefully the rationale in a given case, we either forfeit the possibility of providing useful guidance for business or encourage excessive precaution. In both instances consumers ultimately bear the costs.

Third, the states, almost all of which have their own "Little FTC Acts," look to Commission decisions for guidance interpreting those Acts. Several of these statutes specifically incorporate the Commission's case law.[2] With a large number of states there is, of course, potential for great diversity in applying the law. This could be exacerbated if the courts reach inconsistent results on similar facts. Again, such a result is unlikely to aid consumers and should be avoided, if possible, by careful action on the Commission's part.

This problem is compounded by the fact that many states provide private rights of action and frequently allow treble damages as a remedy in such private disputes.[3] State courts have repeatedly struggled with litigants' attempts to use those [4] statutes to provide increased damage awards for contract breaches. It is apparent from a review of such cases that the courts have had difficulty distinguishing unfairness cases from breach of contract actions. At times they have resorted to a "bad faith" standard, or have sought other methods of providing some distinguishing features in order to prevent these state statutes from swallowing the common law.[4] To the extent that the Commission can clearly articulate its rationale for reaching a result it can also aid these courts in interpreting their own state statutes.

II. BOUNDARIES OF THE UNFAIRNESS JURISDICTION

Given the enormous number of private contracts operative in the economy that are negotiated, performed, or breached without the involvement of the government (excepting the courts, on [5] occasion) it seems to me apparent that regulation of the great majority of these private agreements was never intended to fall within the jurisdiction of the Federal Trade Commission. However, I have concerns that the

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[2] *See, e.g.*, Mass. Gen. Laws Ann. ch. 93A, Section 2(b)("It is the intent of the legislature that . . . the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act . . .")

[3] *See, e.g.*, Mass. Gen. Laws Ann. ch.93A, Section 11 (providing private rights of action and treble damages); N.C. Gen. Stat. Section 75–16 (same).

[4] *See Marshall v. Miller*, 276 S.E.2d 397, 401 (N.C. 1981), where the Court "expressly overrules" "any possible implication" that "a party must show bad faith in order to recover treble damages" for violation of the State little FTC Act. The same case also rejected the lower court's determination that intentional wrongdoing had to be established. *Id.* at 402. Similarly, in *United Roasters v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), the Court recognized that in interpreting the North Carolina statute the state courts had not limited it to cases where there was injury to consumers, *Id.* at 991, but concluded that the statutory terms "must mean something more than an ordinary contract breach." *Id.* at 992. *See also Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 17–19 (1st Cir. 1985), where the court upheld a treble damage award under the Massachusetts little FTC Act because of a "calculated refusal to pay a clearly owed indebtedness" in a dispute between two businesses, finding the actions a "wilful violation."

majority opinion does not provide readily apparent standards that explain why our jurisdiction is properly invoked in this case. It may prove helpful to explain the rationale and analysis that I believe underlie the Commission's determination that the actions of Orkin in breaching the contracts at issue here constitutes an unfair act or practice.

The analytic tool the Commission has applied to circumscribe its unfairness authority is the tripartite test laid out in the Commission's Policy Statement on Unfairness. The focus of this test is consumer injury. Determination of whether that injury is "unfair" as a legal matter requires consideration not only of the quantum of injury, and any countervailing benefits that the practice produces, but also of the economic forces at work. The Commission's Policy Statement on Unfairness incorporates this economic inquiry of market failures in its discussion of whether injury is reasonably avoidable, stating that:

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing [6] decisions without regulatory intervention—to govern the market.[5]

Put differently, "In making this determination [that a practice is unfair], the FTC and the courts should examine whether any market failure justifying government intervention actually exists; what economic justifications, if any, support the practice; what costs would result from FTC intervention; and finally, whether the remedy is likely to be cost effective or efficient." Gellhorn, *Trading Stamps,* S&H, *and the FTC's Unfairness Doctrine,* 1983 Duke L.J. 903, 955 (1983).

I have no difficulty agreeing with Orkin's proposition that a breach of contract, without more, does not violate Section 5. It is normally not our role to become involved in breaches of contract because private enforcement of private agreements is generally more efficient than governmental intervention. The appropriate question, however, is whether other circumstances apart from simple breach of contract bring this case within the Commission's unfairness jurisdiction.[6] In other words, is there a market failure present in this case? [7]

The only market failure that I perceive on the record presented here is the fact that private actions for damages were not likely to be effective. The Unfairness Statement itself recognizes that in those circumstances injury may not be reasonably avoidable by consumers.

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[5] Statement on Unfairness, *supra,* at 7

[6] Orkin is correct that many of the Commission's past cases involved some defect in the information available to parties when entering contracts, either through misrepresentation, duress, coercion, or the like. *See* Unfairness Statement at 7; Craswell, *The Identification of Unfair Acts and Practices By the Federal Trade Commission,* 1981 Wisc. L. Rev. 107. This does not mean, however, that the Commission's role is limited to those situations.

"In some senses any injury can be avoided—for example, by hiring independent experts to test all products in advance, or by private legal actions for damages—but these courses may be too expensive to be practicable for individual consumers to pursue." Unfairness Statement, n.19 at 7. In this case some, perhaps many, Orkin customers were unable or unwilling to avail themselves of their private remedies because the individual losses are so small.[7] When that is the case the normal incentives provided by the common law of contracts do not operate in the same fashion that they would in most instances.

The common law provides a framework within which parties can structure private agreements. Contracts are entered against the background of the existing rules that define obligations and remedies. The common law generally does not require that parties perform under their agreements. To cite Judge Posner: "it is not the policy of the law to compel adherence to contracts but only to require each party to choose between performing in [8] accordance with the contract and compensating the other party for any injury resulting from a failure to perform." R. Posner, *Economic Analysis of Law* 88 (2d ed. 1977) (hereinafter Posner).[8] The knowledge that the alternative to performance is compensation provides an incentive not to breach except in situations when the party breaching a contract is better off after paying damages to the other party.

If compensation for breach can be avoided, however, there is a breakdown in the normal incentive systems created by the common law of contracts. This not only encourages inefficient breaches, but also alters the underlying agreement by shifting costs or risks from the party who voluntarily assumed them to the other, nonbreaching party. As explained more fully below, then, an unfairness analysis of this record reveals a situation different from the "mere breach of contract" that Orkin posits.

This analysis is hardly unprecedented. It explains many previous Commission decisions. Common law causes of action would have been available in many other Commission cases. But Commission intervention was appropriate because those actions were unlikely to supply an effective remedy. The Supreme Court recognized this early in the Commission's history, when the Court [9] found that something more than a mere private dispute was needed to justify an action "in the public interest." *FTC v. Klesner,* 280 U.S. 19, 28 (1929). In a decision written by Justice Brandeis, one of the key actors in the Commission's

[7] I am not suggesting that this is the only market failure that could justify an unfairness action when a breach of contract is involved.

[8] The Restatement (Second) of Contracts also reflects this policy. "The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach." Introductory Note, Chapter 16, at 100.

creation,[9] the Court noted that it may be in the public interest to bring an action "because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it." *Id.* In my view, the Commission's decision in this matter must rest on precisely this basis.

III. APPLICATION OF UNFAIRNESS TO THE FACTS OF THIS CASE

The focus of the Commission's unfairness analysis is consumer injury. In considering whether conduct is unlawful as an unfair act or practice, the Commission determines whether that injury is: (1) substantial; (2) not outweighed by any offsetting consumer or competitive benefits that the practice produces; and (3) one which consumers could not reasonably have avoided. *International Harvester Co.*, 104 F.T.C. 949, 1061 (1984). **[10]**

A. *Substantial Injury*

The injury to consumers resulting from Orkin's breach of some 207,000 pre–1975 contracts resulted in actual and substantial consumer injury. The harm resulting from Orkin's conduct consists of increased costs for services previously bargained for, and would be equivalent to the contract damages to which consumers would be entitled.

The Commission's requirement that consumer injury be substantial rests in part on the practical difficulties that would ensue if the Commission were to bring cases based on trivial or speculative harm. Without this anchor the Commission would be able to determine that any injury, such as an offense to the good taste of an audience for an advertisement, was actionable. It would be possible to develop many theories of consumer injury that were intangible or wholly subjective, or that would be based simply on the personal perceptions of a majority of the five Commissioners.

Moreover, the requirement that consumer injury be substantial makes good practical sense because it is one component of the cost/benefit analysis upon which the Commission's unfairness jurisdiction is based. In some cases the Commission must, of course, make its best estimate of likely **[11]** consumer injury. The Commission's deception cases, a subset of unfairness, provide a ready example.

In this case, however, a large part of the consumer injury is complete and readily quantifiable, and I agree with the majority's conclu-

[9] *See Exposition Press, Inc. v. FTC*, 295 F.2d 869, 877 (2d Cir. 1961), Friendly, J., dissenting. ("It is deeply significant that the Klesner opinion was written by Mr. Justice Brandeis. For 'he, more than any other man, was the begetter' of the Federal Trade Commission.")

sion that it is substantial. Consumer injury consists of the increased fees they are subject to because of Orkin's breach. They have paid at least $7.5 million in increased renewal fees as a result of Orkin's fee increase.

B. *The Injury Is Not Outweighed by Countervailing Benefits*

The next step in analyzing this case is to determine whether the consumer injury is outweighed by any countervailing benefits to consumers or competition. On the facts of this case, I can see nothing that consumers gained from Orkin's breach of these contracts. Similarly, Orkin's contentions that its actions benefited its competitors, and thus competition, is unpersuasive. Simply put, Orkin drafted contracts assigning to itself the risk of inflation. It later sought to impose that risk on consumers. There is nothing in the record indicating the presence of any offsetting benefits from that action. [12]

C. *The Injury Was Not Reasonably Avoidable by Consumers*

The next element of the unfairness analysis is inquiring whether the injury could be reasonably avoided by consumers. If consumers can choose among competitors or are otherwise able to protect themselves it is not the Commission's role to second-guess the wisdom of their decisions. A central focus of determining whether the injury was reasonably avoidable, therefore, is ascertaining whether there is some impediment preventing consumers from protecting themselves—whether there is a "market failure."[10]

The issue in this case, therefore, is whether there were any steps that consumers could reasonably have taken to avoid the injury stemming from Orkin's breach of contract. Thus it is necessary to inquire whether consumers could have acted before entering these contracts, whether they could have avoided the injury after breach by mitigating their damages, and whether they could have reasonably pursued legal action for compensation. [13]

1. Avoidance Prior to Contracting

The first question is whether Orkin's pre–1975 customers reasonably could have avoided the injury they suffered from the increase of their annual renewal fees at the time of contracting. There is nothing in the record indicating that consumers could or should have known that Orkin would unilaterally raise its annual renewal fee. Moreover, the contracts themselves are quite explicit in providing a fixed annual

[10] As the Commission stated in its discussion of this element in its Policy Statement: "Normally we expect the market place to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory." Policy Statement at 7.

fee. As a result, there was no reason for these consumers to anticipate Orkin's actions and they could thus not have avoided them prior to entering the contracts.

2. Avoidance Through Mitigation

Similarly, mitigation was not a reasonable alternative for consumers to have pursued in this case. Neither the Orkin accommodation program nor the possibility of attempting to get one of Orkin's competitors to assume these contracts provided an effective avenue for avoiding injury.

Orkin asserts that customers with pre–1975 contracts could have simply transferred their business to one of Orkin's competitors, and that those competitors would have assumed the obligations contained in these Orkin contracts for either the original renewal fee or for less than the amount that Orkin [14] increased them to. To the extent that this was a possibility for Orkin customers, however, there is at a minimum injury resulting from the transaction costs expended by Orkin consumers in locating another company and entering a new contract.[11]

Moreover, even granting Orkin all reasonable inferences it has not raised genuine issues of material fact necessitating trial on this issue. The affidavits of Orkin's competitors state that they have assumed Orkin contracts at the same annual renewal fee promised by Orkin.[12] However, none of the competitors identified in these affidavits state that they had a fixed renewal fee that did not go up. As a result, consumers who went elsewhere were still subject to the risk of inflation. It was that risk that Orkin agreed to assume in these contracts.

Moreover, there was more to these contracts than the cost of the annual renewal fee, and the affidavits offered by Orkin do not indicate that the competitor's services were comparable to Orkin's. There is no indication, for example, that treatments used by other companies were as effective as those of Orkin. This matters because the annual inspections that were performed [15] after the annual renewal fee was paid also included any necessary retreatment.

Complaint counsel has demonstrated that Orkin's breach deprived consumers of the benefits from a fixed annual renewal fee. Orkin has provided no indication that consumers had any alternative means of obtaining that feature, and has thus failed to raise a genuine issue of material fact on this point.

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[11] It is possible that the most effective means of mitigation under the circumstances was to pay the increased fees subject to later legal action for damages. *See* Restatement (Second) of Contracts § 350, comment e, at 130 ("If the party in breach offers to perform the contract for a different price, this may amount to a suitable alternative").

[12] *See* affidavits of Hromada (Terminix), Murphy (Radar) and Tindol (TNA).

3. Avoidance Through Legal Action

There is no allegation that Orkin intended anything other than performance when it offered a fixed annual renewal fee. It is efficient for parties to be able to plan for future events and contingencies by entering contracts for performance at a subsequent time. Such agreements are only practical, of course, when they can be enforced.[13] The enforcement mechanism for breach of contract has been developed through the common law. The rules developed through the judicial system provide a framework for private agreements, and in most cases provide the [16] appropriate incentives for parties to either perform or breach and pay damages.[14]

With a large number of small contracts, however, the cost of litigating an individual loss may be greater than the expected individual recovery. In such situations the market may not provide an adequate disincentive for contract breach. Thus, the question for purposes of this element of the unfairness test is whether actions for contract damages are an economically feasible method of damage avoidance.

This type of market failure underlies many of the Commission's enforcement initiatives. In deception cases common law rights of action are frequently available to consumers, but the individual damages are normally too small to justify the necessary litigation. Similarly, the Commission's Mail Order [17] Rule[15] tends to encourage compliance with what are fundamentally contract rights.

When these principles are applied to the instant case it becomes readily apparent that this is more than a simple breach of contract, and that Orkin's actions in unilaterally raising the annual renwal fees in these contracts is an unfair act within the meaning of Section 5. Individual private actions for damages would not have been effective in this case, given the small dollar amount of the increase in the

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[13] Without some enforcement mechanism for contractual relations, parties would have difficulty determining in advance which companies would abide by those agreements. If consumers have no assurance that the other party will either perform, or provide the monetary equivalent of performance, they would be unable to make rational decisions about which party to contract with. In this case, for example, consumers might well have chosen to deal with a different company had they known that Orkin would subsequently repudiate a material term of these contracts.

[14] It is not necessary that parties always perform. In fact, it is sometimes more efficient for parties to breach if it costs less to compensate the other party than it does to perform. An example may help illustrate the point. The Arctic Earmuff Company contracts to sell 1000 earmuffs to the Boston Earmuff Emporium for $.50 a pair. The Boston Emporium plans to resell them for $1.00 a pair. Unfortunately, AEC has old machinery that breaks down and is irreparable. If AEC must perform, it would be required to obtain new machinery at substantial cost. The Arctic Earmuff Company might prefer to pay damages and not buy more machinery, and exit this declining industry. The Boston Emporium would probably be just as happy with the lost profits ($.50 × 1000 = $500). If so, it is indifferent between performance and breach. Requiring Arctic to perform could result in a substantial societal loss if it could not recover the costs for new machinery from other business.

[15] 16 C.F.R. Part 435 (1986). CCH para. 38,040. This is made explicit in the Statement of Basis and Purpose of the Rule, 40 FR 51582, 51585 (1975). "The high costs of going to court as well as jurisdictional limitations prevent consumers from seeking remedial legal action. 'From the consumer's point of view . . . in many cases the amount of money involved is significant, but not enough to make it worthwhile to the consumer to force the seller to fill the order, or to try to recover his money through the use of legal remedies. In these situations, the individual is simply at the mercy of the mail-order merchandiser'." *Id.* at 37.

annual renewal fee charged to each consumer.[16] Moreover, class actions are often not effective vehicles for obtaining relief.[17] In addition, of [18] course, it is unlikely that Orkin customers realized that they were being deprived of a legally enforceable right.

I therefore conclude that the respondent's pre–1975 customers could not reasonably have avoided or mitigated the injury that they sustained as a result of Orkin's increase of their annual renewal fee. I conclude that the respondent's increase of the annual renewal fees on its pre–1975 contracts constituted an unfair act or practice in violation of Section 5, and I concur in entry of the order[18] proposed by the majority.

Concurring Statement of Commissioners Terry Calvani and Andrew Strenio, Jr.

The Commission today has determined that Orkin has been acting in violation of Section 5 of the Federal Trade Commission Act by unilaterally changing the terms of agreements with some 200,000 customers. These violations have increased Orkin's revenues by over $7.5 million thus far. While the Commission declares Orkin's acts to be unfair, its order allows Orkin to retain the money. We concur in the Commission's decision but do not think that it goes far enough. Restitution is appropriate here.[1] Indeed, restitution may be the only

[16] Even where private actions are brought under state Little FTC Acts for breaches of contract like the present one this market failure may still be involved. Consumers in situations like the current one might well contend that the problem was that the company breached the contracts in circumstances where they knew or should have known that individual breach of contract actions were not likely.

[17] "The class action remains . . . a very troublesome procedure." F. James & G. Hazard, *Civil Procedure* § 10.18 at 507 (2d ed. 1977). *See* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv.L.Rev. 661, 667–68 (1977) ("consumer class suits often are impossible to bring because of decisions in the federal system making it impossible to aggregate separate claims in order to satisfy the $10,000 jurisdictional amount and because of the impracticality in many states of maintaining a class action.")

[18] The final order requires Orkin to roll back the contract price to its consumers with the Pre–1975 contracts, and wait at least two years before seeking modifications of the contracts. This is, in essence, a requirement of specific performance. As such, it raises the usual issues that courts have considered regarding whether that remedy is appropriate. In such orders the courts—and in this case the Commission—confront the difficulty of determining whether firms subject to specific performance mandates are living up to all the terms of their agreements. As a general matter, I believe that the Commission should avoid placing itself in such situations.

Possibly the most effective remedy that could be provided in this matter would be monetary compensation for the consumers involved. Specific performance is normally granted only when the remedies at law are inadequate. Although I understand the desire of Commissioners Calvani and Strenio to require Orkin to pay damages in this proceeding I do not share their confidence that such a remedy is available in the Commission's enforcement arsenal. Given those circumstances, I support entry of the final order included in the majority opinion.

[1] The Commission has long held that it has the power to order restitutionary relief. *MacMillan, Inc. et al.*, 96 F.T.C. 208 (1980); *Raymond Lee Organization*, 98 F.T.C. 481 (1978); *Credit Card Service Corp.*, 191 (1973); *Curtis Publishing Co.*, 78 F.T.C. 1472 (1971). *But see Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). *Accord, Barrett Carpet Mills, Inc. v. CPSC*, 635 F.2d 299, 301 (4th Cir. 1980); *Congoleum Indus. Inc. v. CPSC*, 602 F.2d 220 (9th Cir. 1979). (However, the Commission has consistently asserted its disagreement with *Heater*. *See, e.g., Francis Ford, Inc.*, 94 F.T.C. 564, 622–23 (1979), *rev'd sub nom. Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982); *Genesco, Inc.*, 89 F.T.C. 451, 478 (1977); *Electronic Computer Programming Institute*, 86 F.T.C. 1093, 1095 (1975)).

effective remedy.[2] We would have ordered Orkin to refund its ill-gotten gains.

Final Order

This matter has been heard by the Commission upon the appeals of the respondent, Orkin Exterminating Company, Inc. ("Orkin"), and complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying opinion, the Commission has determined to deny the appeals of both Orkin and complaint counsel and to affirm the initial decision of the administrative law judge. Accordingly,

It is ordered, That the findings of fact and initial decision of the Administrative Law Judge be adopted insofar as they are not inconsistent with the findings of fact and conclusions of law contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and the same hereby is, entered:

The following definitions shall apply in this order:

A. *Customer* means any consumer or business owning or holding a pre–1975 contract or guarantee, as defined below, entered into or issued by Orkin and any successor in interest to such a consumer or business.

B. *Contract* means any agreement entered into by Orkin to supply services to control termites, wood-infesting organisms, moisture, or wood decay. [2]

C. *Guarantee* means any guarantee extended by Orkin in connection with a contract.

D. *Pre–1975 contract* means any currently effective contract entered into by Orkin during the period from January, 1966, to February, 1975, that includes the term "lifetime" and that does not provide for adjustments to or increases of the annual fee except and unless the treated premises are structurally modified, altered or otherwise changed after the date of initial treatment.

E. *Pre–1975 guarantee* means any guarantee extended by Orkin in connection with a pre–1975 contract.

I.

It is further ordered, That Orkin, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, di-

[2] *Credit Card Service Corp.*, 82 F.T.C. 207 (1973).

rectly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any product or service to protect a house, building or other structure from termites, wood-infesting organisms, moisture, or wood decay, shall forthwith cease and desist from:

A. Charging, requesting, collecting or accepting under any pre–1975 contract or pre–1975 guarantee any annual renewal fee that is greater than the fee specified therein except in accordance with any clause in that contract or guarantee that applies if the treated premises have been structurally modified, altered or otherwise changed after the date of initial treatment.

B. Refusing to accept the amount of the annual fee stated in the pre–1975 contract or pre–1975 guarantee as payment in full for renewing a pre–1975 guarantee.

C. Refusing to perform the services specified in any pre–1975 contract or guarantee upon timely tender of the annual fee stated therein.

D. Charging, requesting, collecting or accepting under any contract or guarantee any annual fee that is greater than the fee specified therein unless the contract or guarantee clearly and conspicuously discloses that such annual fee may be increased at Orkin's option. [3]

E. Modifying, changing, altering or attempting to modify, change or alter, the amount of the annual renewal fee or the duration of the level of that fee in any contract and/or guarantee unless the contract or guarantee clearly and conspicuously discloses that such a modification, change or alteration may be made at Orkin's option.

Provided, however, That nothing contained in this order shall prevent Orkin from seeking modification or novation of its pre–1975 contracts and pre–1975 guarantees that would permit, *inter alia,* a change in the annual fee to be paid or the services to be rendered, *provided further,* that Orkin may not seek such a modification or novation until after the second anniversary of the renewal of any pre–1975 contract or guarantee that is renewed after the date this Order becomes final; *provided further,* that in any attempt to seek modification or novation of a pre–1975 contract as provided in this order, Orkin may not represent, directly or by implication, that a customer is required to agree to the modification or novation being sought. Orkin shall include with the reports on compliance required by Part V of this order:

(1) documents showing each and every representation, whether oral or written, made during the period covered by the report in connec-

tion with each such attempt to seek a modification or novation of any pre–1975 contract and/or pre–1975 guarantee;

(2) the names and addresses of any holder of a pre–1975 contract or guarantee with whom the respondent has communicated concerning modification or novation during the period covered by the report; and

(3) copies of each contract that is modified or subjected to novation as a result of these communications during the period covered by the report.

II.

It is further ordered, That, within 60 days after the date this order becomes final, Orkin shall send a notice in the form prescribed below to each customer (except those customers for whom Orkin has previously rescinded its 1980 fee increase). The notice shall be sent by first class mail to the billing address provided for each such contract or guarantee and, where the address of the treated structure is different from the billing address, to the address of the covered structure. The notice shall be sent no later than two months before the anniversary [4] date of the initial treatment under such contract or guarantee and shall read as follows:

Dear Customer:

This letter contains important information about a *decrease in the annual renewal fee.* Please read it.

Beginning in 1980, Orkin increased the annual renewal fee for lifetime guarantees offered in certain of its termite and related pest control contracts, including yours. The Federal Trade Commission has ordered Orkin to rescind this fee increase and to roll back your annual fee to the amount stated in your contract or guarantee. Under the terms of the Federal Trade Commission order, you will continue to receive the lifetime protection that Orkin has guaranteed as long as you pay the annual fee specified in the contract.

The Federal Trade Commission's order does not alter Orkin's right to terminate the guarantee or increase the fee under the terms of your original agreement if you have structurally modified the treated property. Absent such a structural modification, Orkin may not now or in the future increase that fee without your consent.

If you would like to continue your guaranteed protection, please submit your annual fee in the amount specified in your contract along with the enclosed invoice. We suggest you check the amount of the annual fee stated in your contract or guarantee with that of the enclosed invoice. If there is any discrepancy or you have any other questions, please call your local branch.

Sincerely yours,

President of Orkin
[or other Orkin official]

Each envelope containing the foregoing notice shall bear the follow-

ing legend in red, 14 point print on its face: IMPORTANT NOTICE OF ANNUAL FEE REDUCTION ENCLOSED. [5]

III.

It is further ordered, That, within 30 days after the date this order becomes final, Orkin shall distribute a copy of this order to each of its officers, directors, district managers and branch managers, and to each person who assumes any of these positions during each of the first two years of the date on which this order becomes final, and that Orkin shall secure from each of these persons a signed statement acknowledging receipt of said order.

IV.

It is further ordered, That Orkin shall maintain for a period of five years after the date on which this order becomes final records showing the manner and form of Orkin's compliance with this order and shall make them available for inspection by the Commission within 30 days of receipt of a request for an inspection.

V.

It is further ordered, That Orkin shall within 60 days after the date this order becomes final and every 180 days thereafter for a period of three years, file with the Commission a written report setting forth in detail the manner and form in which it has complied and is complying with this order, and shall file such other reports of compliance as the Commission may from time to time require.

VI.

It is further ordered, That Orkin shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent corporation, such as dissolution, assignment or sale [6] resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

IN THE MATTER OF

VIOBIN CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3204. Complaint, Dec. 17, 1986—Decision, Dec. 17, 1986

This consent order prohibits, among other things, a Monticello, Ill. manufacturer and seller of wheat germ oil products, as well as its Richmond, Va. parent company, from misrepresenting that their wheat germ oil products can help consumers improve endurance, stamina, vigor, or any aspect of athletic fitness, or that octacosanol, the active ingredient in its products, is in any way related to body reaction time, oxygen debt, or athletic performance. Additionally, respondents are required to run corrective advertising for a specified period of time.

Appearances

For the Commission: *Brinley H. Williams* and *Cheryl B. Anderson.*

For the respondents: *Lawrence Sharp, McGuire, Woods & Battle,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Viobin Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Viobin Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. Viobin Corporation, a wholly-owned subsidiary of A.H. Robins Company, Incorporated, has its offices and principal place of business at 226 Livingston Street, Monticello, Illinois.

PAR. 2. Respondent is now and has been engaged in the manufacture, offering for sale, and sale of nutritional supplements, including Viobin Wheat Germ Oil, Prometabs and Prometol, and other products for personal or household use by members of the general public.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising and promotional material, including, but not limited to, the advertising and labeling referred to herein, to promote the sale of Viobin Wheat Germ Oil, Prometabs and Prometol. As advertised, Viobin Wheat Germ Oil,

Prometabs and Prometol are "foods" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. Viobin Corporation operates in various States of the United States and in the District of Columbia. Respondent's manufacturing, offering for sale, sale, and distribution of nutritional supplements, including Viobin Wheat Germ Oil, Prometabs and Prometol, mentioned herein constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements for nutritional supplements, including Viobin Wheat Germ Oil, Prometabs and Prometol, by various means in or affecting commerce, including national magazines, product labels, and point of sale brochures, distributed by the mail and across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products.

PAR. 6. Typical statements in said advertisements, and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements and promotional materials attached hereto as Exhibits A through D. Specifically, the aforesaid advertisements contain the following statements:

(a) Improve stamina and endurance with Viobin Wheat Germ Oil.

(b) Free Booklet - summarizes strong evidence of the beneficial effect of Viobin Wheat Germ Oil with octacosanol on physical fitness.

(c) More than 18 years of university research show positive evidence that Viobin Wheat Germ Oil can help athletes increase stamina and endurance plus help them overcome fatigue more quickly. These benefits are achieved separately and apart from the effects of physical training.

(d) Studies indicate that octacosanol has a beneficial effect on oxygen intake, net oxygen debt and total body reaction time.

(e) Prometol helps increase endurance, stamina and vigor.

(f) Prometabs helps increase endurance, stamina and vigor.

PAR. 7. Through the use, *inter alia*, of the statements referred to in Paragraphs Six (a) through Six (f), and other representations contained in advertisements or promotional materials not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that the use of Viobin Wheat Germ Oil, Prometabs and Prometol can help improve consumers' endurance, stamina, total body reaction time, ability to overcome fatigue, and overall athletic performance or overall physical fitness.

PAR. 8. The representations contained in Paragraph Seven are false, for the reason that the use of Viobin Wheat Germ Oil, Prometabs or Prometol will not improve consumers' endurance, stamina,

total body reaction time, ability to overcome fatigue and overall athletic performance or overall physical fitness.

PAR. 9. Through the use, *inter alia*, of the statements referred to in Paragraph Six (b) and Six (d), respondent has represented, and now represents, directly or by implication, that the octascosanol in Viobin Wheat Germ Oil, Prometabs and Prometol is effective in improving consumers' total body reaction time, oxygen uptake and net oxygen debt and thereby improves consumers' physical performance or physical fitness.

PAR. 10. The representations contained in Paragraph Nine are false, for the reason that the octacosanol in Viobin Wheat Germ Oil, Prometabs and Prometol does not improve consumers' total body reaction time, oxygen uptake, net oxygen debt or improve consumers' physical performance or physical fitness.

PAR. 11. In making the representations referred to in Paragraphs Seven and Nine, respondent has represented directly or by implication that at the time of making those representations it possessed and relied upon a reasonable basis for those representations.

PAR. 12. In truth and in fact at the time of making the representations referred to in Paragraphs Seven and Nine, respondent did not possess and rely upon a reasonable basis for those representations. Therefore, the representation referred to in Paragraph Eleven was and is false and misleading.

PAR. 13. The use by respondent of the aforesaid acts and practices, directly or by implication, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid statements, representations, acts, and practices, have had and now have the capacity and tendency to mislead consumers and to induce such persons to purchase Viobin Wheat Germ Oil, Prometabs and Prometol.

PAR. 14. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

EXHIBIT A

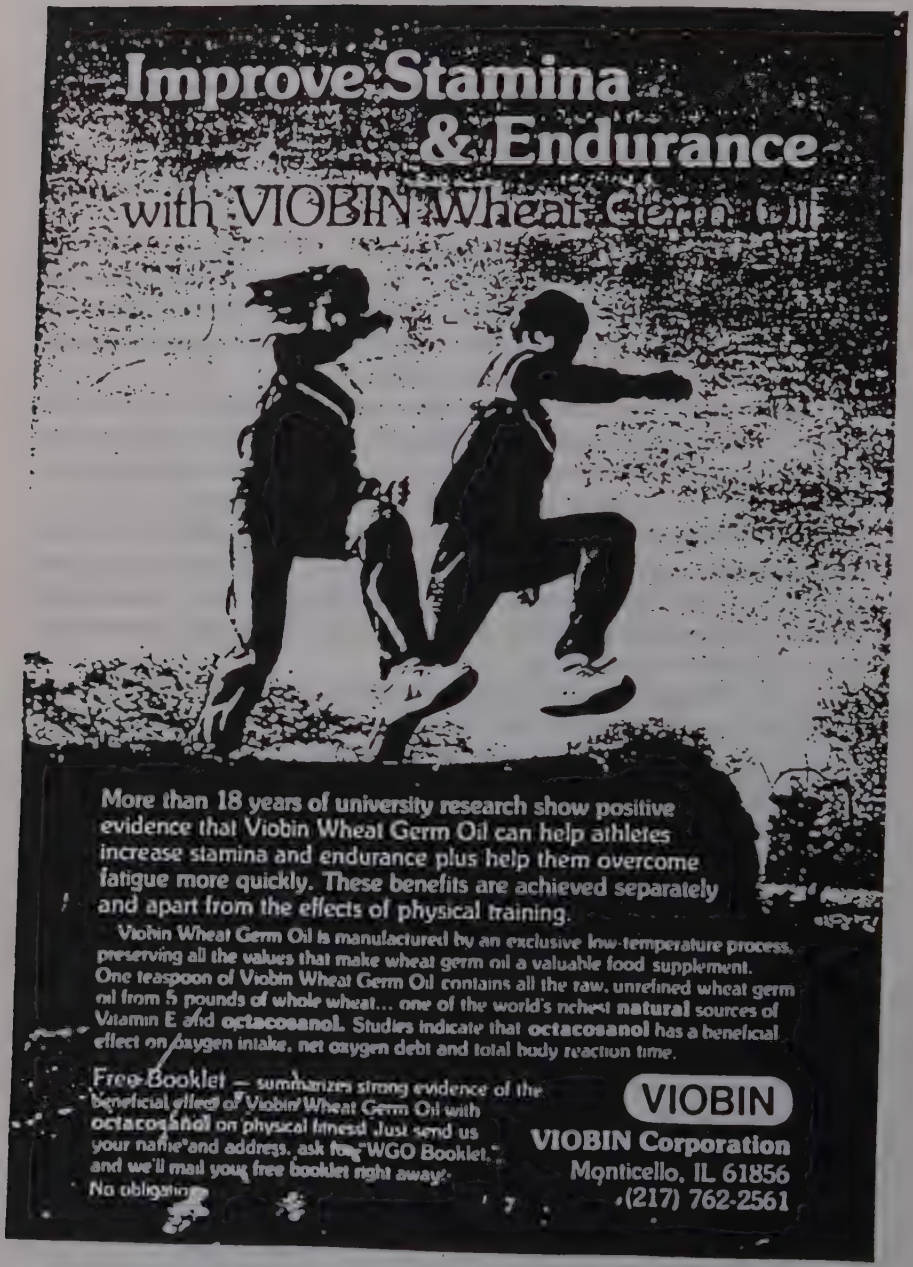
Improve Stamina & Endurance
with VIOBIN Wheat Germ Oil
More than 18 years of university research show positive evidence that Viobin Wheat Germ Oil can help athletes increase stamina and endurance plus help them overcome fatigue more quickly. These benefits are achieved separately and apart from the effects of physical training.
Viobin Wheat Germ Oil is manufactured by an exclusive low-temperature process, preserving all the values that make wheat germ oil a valuable food supplement. One teaspoon of Viobin Wheat Germ Oil contains all the raw, unrefined wheat germ oil from 5 pounds of whole wheat... one of the world's richest natural sources of Vitamin E and octacosanol. Studies indicate that octacosanol has a beneficial effect on oxygen intake, net oxygen debt and total body reaction time.
Free Booklet — summarizes strong evidence of the beneficial effect of Viobin Wheat Germ Oil with octacosanol on physical fitness! Just send us your name and address, ask for "WGO Booklet," and we'll mail your free booklet right away. No obligation.
VIOBIN
VIOBIN Corporation
Monticello, IL 61856
(217) 762-2561

EXHIBIT B

Improve Stamina & Endurance

with VIOBIN Wheat Germ Oil

More than 18 years of university research show positive evidence that Viobin Wheat Germ Oil can help athletes increase stamina and endurance plus help them overcome fatigue more quickly. These benefits are achieved separately and apart from the effects of physical training.

Viobin Wheat Germ Oil is manufactured by an exclusive low temperature process, preserving all the values that make wheat germ oil a valuable food supplement. One teaspoon of Viobin Wheat Germ Oil contains all the raw, unrefined wheat germ oil from 5 pounds of whole wheat — one of the world's richest **natural** sources of Vitamin E and **octacosanol**. Studies indicate that **octacosanol** has a beneficial effect on oxygen uptake, oxygen debt and total body reaction time.

Free Booklet — summarizes strong evidence of the beneficial effect of Viobin Wheat Germ Oil with **octacosanol** on physical fitness. Just send us your name and address with "WGO Booklet" and we'll mail your free booklet right away. No obligation.

VIOBIN

VIOBIN Corporation
Monticello, IL 61856
(217) 762-2561

EXHIBIT C

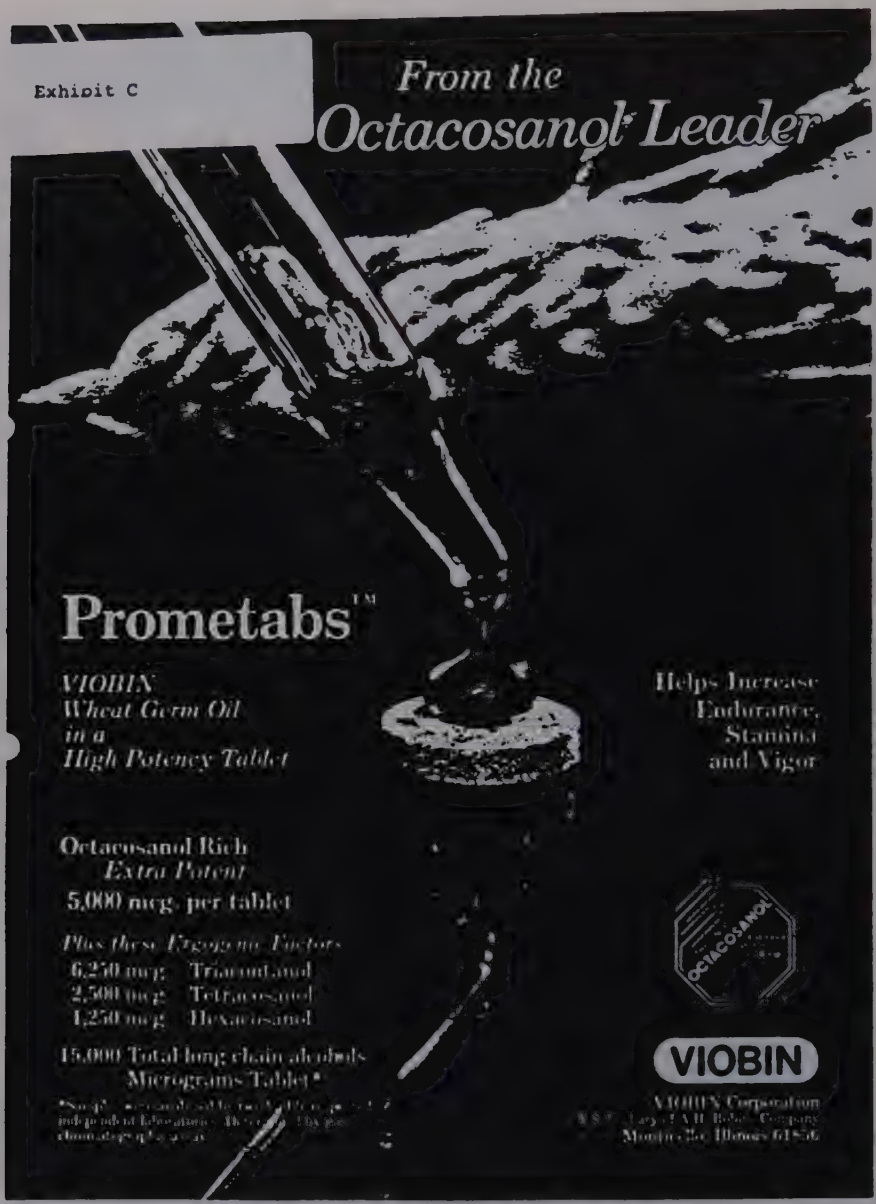

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EXHIBIT D

EXHIBIT D
PROMETOL®
The
Gem
Helps Increase
Endurance,
Stamina and Vigor
Each 10 minim
capsule provides:
2000 micrograms
per 10 minim capsule
The octacosanol found in more than
5 teaspoonsful of VIOBIN Wheat Germ Oil
or more than 24 pounds of whole wheat.
10% of the U.S. recommended daily allowance
of vitamin E (natural, of course).
A concentrate of other valuable nutrients found in
VIOBIN Wheat Germ Oil.
Each Prometol 10 minim capsule contains 2000
micrograms of the amazing nutrient, octacosanol
verified by multiple assays employing sophisticated
techniques to elicit precise measurement.
Available at your local health food store.
VIOBIN Respected for years!
VIOBIN
VIOBIN Corporation

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent and its parent corporation, A.H. Robins Company, Incorporated, having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its parent corporation, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent and its parent corporation of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent or its parent corporation that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Viobin Corporation (Viobin) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. Viobin has its offices and principal place of business at 226 Livingston Street, Monticello, Illinois.

A.H. Robins Company, Incorporated, (A.H. Robins) is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia. A.H. Robins has its offices and principal place of business at 1407 Cummings Drive, Richmond, Virginia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and its parent corporation and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent Viobin Corporation, a corporation, its parent corporation, A.H. Robins Company, Incorporated, and all the other subsidiaries of A.H. Robins Company, Incorporated, their successors and assigns (hereinafter collectively "the companies"), and the companies' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of Viobin Wheat Germ Oil, Prometabs, Prometol, or any other product of substantially similar composition or possessing substantially similar properties, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that the product can help consumers improve endurance, stamina, vigor, reaction time, or any aspect of athletic fitness or performance.

B. Representing, directly or by implication, that octacosanol is related in any way to body reaction time, oxygen uptake, oxygen debt, or athletic fitness or performance.

II.

It is further ordered, (1) That respondent Viobin Corporation, its successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of any product for personal or household use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, and (2) That A.H. Robins Company, Incorporated, its successors and assigns, and their officers, agents, representatives, and employees directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of any wheat germ oil product or any product advertised as containing octacosanol, triacontanol, tetracosanol, or hexacosanol, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, the purpose, content, sample, reliability, results or conclu-

sions of any scientific test, research or article, or any other scientific opinion or data.

III.

A. *It is further ordered,* That the companies and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of any product for personal or household use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning any benefit to be derived from using any such product with respect to athletic performance, capability or endurance unless, at the time of such representation, the companies possess and rely upon reliable and competent evidence that substantiates each such representation of the type and quantum appropriate for the representation.

B. For the purpose of Part III. A. to the extent evidence consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

IV.

It is further ordered, That respondent Viobin Corporation, its successors and assigns, and their officers, agents, representatives and employees:

A. Clearly and prominently disclose the following statement in each advertisement for Viobin Wheat Germ Oil, Prometabs and Prometol appearing in any magazine, any newspaper, or on any radio or television broadcast within one year of the date of service of this order:

Our earlier studies of the effects of wheat germ oil and octacosanol on endurance, stamina and vigor, while following techniques accepted at the time, do not meet the criteria of modern testing and therefore we no longer claim that the use of wheat germ oil or octacosanol will improve endurance, stamina or vigor, or any aspect of athletic fitness or performance.

B. Shall within six (6) months of the date of service of this order

place in each of the print publications in which any advertisement for Viobin Wheat Germ Oil appeared during calendar year 1985 at least one advertisement, not less than 5″ × 7-½″ in size, that clearly and prominently discloses the statement set forth in Paragraph IV. A.

V.

It is further ordered, That, for three years after the last date of dissemination of the representation, the companies and their officers, agents, representatives and employees, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies:

1. Of all materials that were relied upon in disseminating any representation covered by this order.

2. Of all test reports, studies, surveys, or demonstrations in their possession or control or of which they have knowledge that contradict any representation made that is covered by this order.

VI.

It is further ordered, That respondent Viobin Corporation notify the Commission at least thirty (30) days prior to any proposed change in respondent or its parent corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

VII.

It is further ordered, That the companies shall forthwith distribute a copy of this order to each of their operating divisions and to all distributors of Viobin Wheat Germ Oil, Prometabs, Prometol or any other products of substantially similar composition.

VIII.

It is further ordered, That respondent Viobin Corporation shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form of compliance with this order.

IX.

It is furthered ordered, That no provision of this order shall be interpreted as precluding respondent from making statements or disclosures on its labels or labeling where those statements or disclosures are required by regulations promulgated by the Food and Drug Administration (FDA) or with statutes the FDA enforces.

Proposed barter program with foreign countries for phosphate rock would avoid respondent's involvement in other than export trade and falls under the protection of the Webb-Pomerene Act. [*Phosphate Rock Export Association, P86 9613*]

Dear Mr. Fogt: December 3, 1986

This letter responds to your request on behalf of the Phosphate Rock Export Association ("Phosrock") for an advisory opinion concerning a proposed barter program. That request poses a novel question of law, for which there is no clear Commission or court precedent, and thus under Section 1.1 of the Commission's Rules of Practice an advisory opinion is appropriate. Your first letter, dated April 8, 1986, proposed Phosrock involvement in a kind of activity not authorized by the Commission in its 1983 advisory opinion. [102 F.T.C. 1844] The Commission feels now, as it did then, that Phosrock's sale in the United States of the bartered-for products would not be solely export trade or in the course of export trade. As modified by your July 10, 1986 letter, however, Phosrock's proposed use of a broker to liquidate received products appears to avoid Phosrock's involvement in other than export trade and therefore falls under the protection of the Webb-Pomerene Act (the "Act"), 15 U.S.C. 65.

Based on the information provided, the Commission understands that Phosrock is an association formed pursuant to Section 5 of the Act. Membership is open to any person, firm or corporation mining phosphate rock in the United States. Phosrock makes no sales for United States domestic consumption, and does not have anything to do with determining the price of phosphate rock or any other product sold for United States domestic consumption.

Phosrock proposed in its July 10, 1986 letter to negotiate sales of phosphate rock on behalf of the Association to India and the Philippines. Phosrock anticipates that both India and the Philippines will not permit 100 percent cash payment, but will require Phosrock to accept as payment or partial payment some products of those countries. Phosrock proposes to accept shrimp. If the purchasing country requires Phosrock to accept Indian or Philippine products rather than cash in exchange, Phosrock will negotiate the exchange ratio of phosphate rock for shrimp. If a member requests that it receive its proportional share of the shrimp, Phosrock will arrange for it to receive bartered-for products in proportion to that member's contribution to the total amount of phosphate rock exported. Phosrock itself will neither consume nor resell the shrimp. If members elect not to receive their proportionate share of shrimp, Phosrock will turn the shrimp over to a shrimp broker for resale. Phosrock will distribute the cash proceeds of that sale to its members in proportion to their contribution to the amount of phosphate rock exported.

While Phosrock's current proposal contemplates Phosrock involvement in activities different from those the Commission approved in 1983, the Commission believes that, as long as Phosrock uses a broker to liquidate received products in this or any future barter programs it would be engaged solely in export trade as that term is defined in Section 1 of the Act, 15 U.S.C. 61, and its acts would constitute acts done in the course of export trade as that phrase is used in Section 2 of the Act, 15 U.S.C. 62.

The Commission has not examined the United States markets for phosphate rock and shrimp, to determine whether the proposed barter program will restrain trade in phosphate rock or shrimp in the United States, restrain the export trade of any of Phosrock's domestic competitors, artificially enhance or depress prices in the United States, substantially lessen competition, or otherwise restrain trade in the United States. Phosrock should take care to assure that its barter activities will not have any of the domestic effects prohibited by the Act.

This advisory opinion, like all those the Commission issues, approves only the conduct described in this letter, and that only so long as the barter program does not have any of the domestic effects prohibited by the statute. Phosrock would risk losing its Webb-Pomerene Association status, or an enforcement action, if it enlarged its participation in the proposed barter program beyond that described above. The Commission reserves the right to reconsider the legal and factual issues involved in this request, and to rescind or revoke its opinion in accordance with Section 1.3(b) of its Rules of Practice if implementation of the proposed barter program results in substantial anticompetitive effects, if Phosrock engages in activities not herein approved, or if the public interest otherwise requires.

By direction of the Commission.

Letter of Request

April 8, 1986

Dear Ms. Rock:

On behalf of the Phosphate Rock Export Association ("Phosrock" or the "Association") and its members, we are submitting this request for an advisory opinion from the Federal Trade Commission regarding a proposed barter program. The Federal Trade Commission previously approved Phosrock's request to barter phosphate rock for sulfur with the Governments of Mexico and Poland in an August 1, 1983 advisory opinion attached hereto as Exhibit A.* Phosrock's current request seeks an advisory opinion with respect to a contemplated

* Not reproduced herein. *See* 102 F.T.C. 1844.

barter program for various additional products with a variety of different countries. This proposed program is set forth in greater detail below along with a discussion of the pertinent background facts and our view of the program's legality under the antitrust laws.

Phosrock was formed in 1970 pursuant to Section 5 of the Webb-Pomerene Act.[1] Its Articles of Incorporation, By-Laws, form of Membership Agreement and current Annual Report are on file at the Federal Trade Commission.[2] The Association engages in all aspects of export sales activity in phosphate rock as a non-exclusive export channel for its members sales. Its responsibilities include market research and analysis, technical assistance, solicitation, negotiation and conclusion of export sales contracts, traffic coordination, invoicing, order processing and collection and distribution of the proceeds of sale. Phosrock is headquartered in Tampa, Florida, and has an office in Paris, France.

Phosrock is engaged solely in "export trade." The Association makes no sales for United States domestic use or consumption; it has nothing to do with determining the price of phosphate rock sold for consumption or use in the United States. Not only does Phosrock not control the amount of phosphate rock available either for sale in the United States or for export, it does not control the amount of rock its members will export. Under the Association's Membership Agreement, each member, acting individually, determines the amount of disposable phosphate rock it will make available for sale each year through the Association. A member's share of Association sales is determined as a function of its relative participation in past Association sales and as the proportion its nominated tonnage bears to the disposable phosphate rock nominated for sale by all members through the Association. Each member, in addition, retains the unfettered right to sell phosphate rock on terms and conditions which it determines individually, to any domestic person for whatever purpose, including exportation.[3] Phosrock has no involvement in export sales by a member company to any affiliated company abroad.[4]

The phosphate rock exported by Phosrock is a mined raw material used in various phosphorous derivative industries, particularly in the manufacture of complex phosphatic fertilizers.[5] Apart from the phosphate rock miners operating in the United States, virtually all other phosphate rock miners in the world are government-owned or con-

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[1] 15 U.S.C. 65.

[2] The members of Phosrock are: Agrico Chemical Company, AMAX Chemical Corporation, Freeport Phosphate Rock Company, Gardinier, Inc., International Minerals & Chemical Corporation, Mobil Mining and Minerals Company, Occidental Chemical Company and W.R. Grace & Co. Membership in Phosrock is open to any person, firm or corporation engaged in the United States mining of phosphate rock.

[3] In addition, subject to availability and mutual agreement on terms and conditions, Phosrock will sell and has sold phosphate rock to domestic persons for exportation.

[4] The term "affiliated company" is defined in Phosrock's Membership Agreement to be a corporation in which a member has a 20% ownership interest.

[5] *See generally Fertilizer Technology and Use* (2d Ed. 1972).

trolled. For example, the Office Cherifien des Phosphates (OCP) of Morocco holds the largest known deposits of minable phosphate rock in the world and derives a substantial portion from the export sale of phosphate rock. Other countries in which phosphate rock miners are government-controlled include Algeria, Egypt, Senegal, Tunisia, Jordan, Syria, China, Viet Nam, Ocean Islands, U.S.S.R., Brazil and Mexico.

Phosrock's efforts to promote American international trade in competition with foreign governmental units have been severely undercut by the worldwide recession in the fertilizer industry. Despite accelerating costs, real phosphate rock prices in the export market have declined to levels at or below producers costs. The industry is currently operating at substantially below capacity; employment has declined from 10,000 in 1981 to 5,500 in 1985.[6] Because of these conditions, the Association has closed offices which it previously operated in Tokyo, Japan and Sao Paulo, Brazil.

In such a depressed market, Phosrock's problems have been compounded by the inability of many of its customers—usually foreign governments—to pay hard currency for phosphate rock. This has been true in the East Bloc countries like Poland as well as in developing countries such as Mexico and Brazil which are experiencing significant financial difficulties. The continuing sharp drop in oil prices is exacerbating this problem, particularly for countries like Mexico.

In order to combat these market conditions, Phosrock sought and obtained an advisory opinion from the Federal Trade Commission, dated August 1, 1983, which permits Phosrock annually to exchange phosphate rock for up to 400,000 M/T of sulfur with the Governments of Mexico and Poland.

Since 1983, the opportunities for countertrade have continued not only with Poland and Mexico but also have arisen in dealings with other potential customers. Brazil provides a useful illustration. When Phosrock was formed, Brazil was one of the larger markets for Florida phosphate rock, importing nearly a million metric tons per year (M/T/Y) from the Association and its members. Thereafter, the Brazilian Government determined to develop its indigenous phosphate resources and to aid that development by reducing and then virtually eliminating phosphate rock imports. After this government decision, imports fell from 1.6 million M/T in 1977 to 185,000 M/T in 1982 and to approximately 9,000 M/T in 1984. Despite the restrictions imposed on the Brazilian market to imported phosphate rock, the Brazilian government has made it known that purchase of Brazilian goods, like shrimp, by potential phosphate rock suppliers may aid in securing necessary import licenses to permit the sale of limited amounts of

[6] *See* U.S. Department of the Interior, Phosphate Rock in 1985 attached hereto as Exhibit B. [Not reproduced herein.]

phosphate rock into Brazil. Indeed, granting of import licenses for Brazil from countries such as Senegal, Mexico and Israel have reportedly been influenced by such a balance of trade considerations.

Given these market conditions, Phosrock desires to be able to engage in a broad range of barter activities with customers in and/or with the governments of countries such as Brazil, India, Indonesia, the Phillippines (sic) and Romania, as well as Mexico and Poland, in which Phosrock would exchange phosphate rock for shrimp, other types of fish, fruit, or other similar products not regularly sold in the ordinary course of business by Phosrock or its members. Accordingly, we are requesting the Federal Trade Commission to render an advisory opinion with regard to Phosrock's participation in such a barter *program* so that the Association need not seek advisory opinions each time it contemplates a slightly different form of barter transaction.

Under the proposed program, the Association would negotiate the exchange ratio for the products involved. No barter transaction will be considered if the quantity of the product to be obtained by the Association (the bartered product) in exchange for the Association's phosphate rock exceeds five percent of the available supply of the bartered product in any relevant U.S. market. In addition, if the bartered product is a product of the kind which a member of the Association or its affiliates sells in the ordinary course of its business, that member would not participate in the Association's decision whether to engage in the proposed barter transaction and would not participate in the Association's decision how to dispose of the bartered product. Unless a member requests that it receive its share of the bartered product directly, the Association in most instances plans to sell the bartered products to foreign or domestic purchasers upon the best terms it can negotiate.[7] The Association then plans to distribute the money obtained from the sale of the bartered products to Association members on the basis of each member's proportionate contribution of the exported phosphate rock. For the reasons set forth below, we view the program as a permissible activity of a Webb-Pomerene association which, in any event, does not raise concerns under U.S. antitrust law.

This proposed barter *program* is substantially similar to the barter *transaction* which the FTC approved in its August 1, 1983 advisory opinion letter. The only difference between the two barter proposals is that in our earlier proposal, the bartered product to be received—sulfur—was one that could be consumed internally by Phosrock's members. Where that was not feasible, it was contemplated that Phosrock's members would individually resell the sulfur in the for-

[7] In some instances however, Phosrock may be able to barter for products such as sulfur and residual oil, which can be consumed internally by Phosrock's members. Accordingly, in these instances those bartered products will not be resold, but distributed to Phosrock's members for their own use according to each member's proportionate contribution of the exported phosphate rock.

eign or domestic marketplace. The Commission agreed that such a barter transaction would constitute an "act in the course of export trade" and "would not artifically (sic) enhance or depress phosphate rock prices or otherwise restrain trade in U.S. markets for phosphate rock or sulfur." Under Phosrock's current barter proposal, most of the products for which Phosrock anticipates being able to trade—various types of fruit and fish and other similar products—will not be useable by Phosrock or its members. Accordingly, unless a member makes a request to the contrary, Phosrock plans to sell such products in the United States or elsewhere under the most favorable terms available and to allocate the money received from such sale to its members. This slightly different manner of disposing of the bartered products, however, does not remove the barter transaction from the course of export trade nor create any anticompetitive effects that would make it subject to antitrust challenge.

As a matter of definition, the exchange of goods for goods universally is recognized to be as much an act of trade as is the exchange of goods for currency. Accordingly, the Association's receipt and conversion of the bartered product must be considered to be an "act done in the course of export trade" in the same way that the Association's distribution of monies to members (sometimes after the conversion of such monies to U.S. dollars) is an act in the course of export trade. Such conduct is one of a variety of ways of implementing an export sale; in some circumstances, as here, where the members of the Association have no experience with, or expertise in, using or trading the bartered product, it is the most efficient and possibly the only feasible way of implementing the barter transaction.

In light of the Webb-Pomerene Act's primary purpose of promoting export trade by permitting American companies to combine in export associations without fear of antitrust exposure, and the Congressional expectation that the Act would apply to export trade via barter,[8] it would be unwarranted to attribute to Congress the intent to bring certain types of barter transactions within the umbrella of Webb-Pomerene immunity and to exclude others without clear evidence that such exclusion from protection of these other types of barter transactions rested on concerns with respect to the *effect* on domestic competition produced by such transactions rather than the *form* adopted to accomplish the barter transaction in question.

It is quite true that Congress sought to foreclose the potential for the abuse of the grant of Webb-Pomerene immunity if export associations were to turn around and sell in domestic channels the *same* commodities that they had been permitted to band together to export. In order to safeguard the domestic market, Congress added the follow-

[8] At time of the Act's passage, barter was as it is today, an important trading method that was and is necessary to employ if U.S. associations are to become better matches for their powerful international trading rivals.

ing qualification to the definition of "export trade" in Section 1 of the Webb-Pomerene Act:

> but the words "export trade" shall not be deemed to include the production, manufacture or selling for consumption or for resale within the United States or any Territory thereof, *of such goods, wares or merchandise,* or any act in the course of such production, manufacture or selling for consumption or for resale. (Italics added)[9]

The phrase "such goods, wares or merchandise" refers to those products being "exported, or in the course of being exported from the United States."

While the proviso directly addresses the congressional concern that members of export association be prevented from colluding to restrain domestic trade in the class of products they are selling overseas, it does not preclude a Webb-Pomerene association from receiving and disposing of other products in exchange for exported products.[10] The limitation to the definition of export trade in Section 1 of the Webb-Pomerene Act thus offers no support for an artificial interpretation of the Act which would make the most common forms of barter transactions ineligible for Webb-Pomerene immunity. Barter is export trade and conversion of a bartered product to currency is a necessary act in the course of such export trade.

Moreover, even though the proposed barter program constitutes an act "in the course of export trade," the program is not automatically immunized from antitrust scrutiny. Rather, under section 2 of the Act, Phosrock's proposed barter program still would be subject to antitrust attack if it: restrained trade within the United States; restrained the export trade of any domestic competitor of the Association; served artificially or intentionally to enhance or depress prices with the United States of commodities of the class exported by the Association; or substantially lessened competition within the United States.[11] However, analysis of the proposed barter program together with the Commission's prior approval of Phosrock's annual barters of 400,000 M/T of sulfur with Poland and Mexico suggest that no such antitrust concerns will be raised here.

Whether Phosrock is engaged in exports for cash or barter, the Association has no role whatsoever in determining the price of phosphate rock within the United States. Thus, there is no feature of the barter program that might serve "artificially or intentionally to en-

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[9] 15 U.S.C. 61. Congress provided in the same vein that if any conduct, whether an act of export trade or not, substantially restrained domestic trade or lessened competition in the United States, it would be subject to antitrust attack. *See* 15 U.S.C. 62.

[10] Thus, it deserves emphasis that Phosrock's proposal does not contemplate either the introduction or the reintroduction of the export product—phosphate rock—into domestic commerce. Under the plan, the product that reaches U.S. shores would be that proffered by a foreign customer in exchange for phosphate rock.

[11] 15 U.S.C. 62. Indeed, it is precisely because of this ability to challenge any such anticompetitive activity of a Webb-Pomerene Association that the Commission should not adopt an unduly restrictive interpretation of those activities that constitute "export trade" or acts "in the course of export trade."

hance or depress prices within the United States" of Phosrock's export product. With respect to the possible restraint of the export trade of a competitor of the Association, we can contemplate no ill effect on an American rival of Phosrock from the Association's engaging in the proposed barter program. Just as is the case when Phosrock trades its export product for currency, a nonmember American company selling in the same foreign market is free to compete with the Association on whatever terms it chooses to offer. In addition, membership in the Association is open to all American producers of phosphate rock.

Finally, no aspects of Phosrock's proposed barter program will restrain trade within the United States or substantially lessen competition within the United States. On the contrary, the proposed barter program is structured so that the products to be bartered for in most instances will be products that the Association and its members do not produce, or sell in the ordinary course of their business.[12] While on occasion, Phosrock may barter for other products like sulfur and residual oil which its members can consume internally,[13] the quantity of product received will be such that its acquisition and consumption by Phosrock's members could not restrain trade. Indeed, the Association will never engage in a barter transaction in which it intends to consume or resell the bartered product in U.S. commerce, if the quantity of the bartered product to be received by the Association comprises 5% or more of the available supply of that bartered product for any domestic U.S. market. Moreover, in most instances, the quantity of the bartered product which Phosrock receives will comprise a fractional percentage at best of the available product supply. In a word, the program will be operated so as to ensure that the Association does not possess "market power" in any bartered product for which it may trade.

Thus, even if Phosrock's proposed barter program is viewed as employing a joint buying or selling arrangement, it is well-established that such cooperative buying or selling arrangements in and of themselves are not *per se* illegal. They raise antitrust concerns only when the group has substantial economic power in the market for the commodity to be purchased or sold[14] or when the arrangement is accom-

[12] In the event that the Association barters phosphate rock for a product which is sold in the regular course of business by a member or its affiliate, the member will not participate in deciding whether the Association shall participate in the barter transactions and shall not participate in the Association's decision regarding the disposal of the bartered product.

[13] *See note 7 supra.*

[14] Thus, the courts have frequently held that the operations of buying and selling groups (*e.g.*, of theatre owners jointly purchasing films; of small grocers purchasing food-stuffs in bulk; of greeting card buyers using a buying corporation; of competing coal producers using a joint selling agent; and of copyright holders using a joint licensing agent) do not violate the antitrust laws. *See Central Retailer-Owner Groceries, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963) (small grocers); *Arkansas Brokerage Co. v. Dunn & Powell, Inc.*, 173 F. 899 (8th Cir. 1909) (mercantile jobbers); *G&P Amusement Co. v. Regent Theatre Co.*, 107 F.Supp. 453 (N.D. Ohio 1952), *aff'd*, 216 F.2d 749 (6th Cir. 1954) (theatres); *Mid-West Theatres Co. v. Cooperative Theatres, Inc.* 43 F.Supp. 216 (E.D. Mich. 1941) (theatres); *Associated Greeting Card Distrib.*, 50 F.T.C. 631 (1954) (greeting cards); *Appalachian Coals Inc. v. U.S.*, 288 U.S. 344 (1933) (coal producers); *Broadcast Music Inc. v. CBS*, 441 U.S. 1, 14–15 (1979) (copyright owners).

panied by anticompetitive restrictions on the members' ability to resell the commodity purchased.[15] As set out herein, neither of those conditions would be present under Phosrock's proposal. Thus, the program will not substantially lessen competition within the United States.[16]

In passing the Webb-Pomerene Act, Congress sought to provide American companies with the flexibility for combatting foreign buying and selling cartels in order to expand U.S. export trade. Phosrock's proposed barter program promotes this objective without endangering U.S. commerce in any respect. Neither domestic commerce in phosphate rock or the bartered product will be substantially affected.[17]

We would be happy to meet with you to discuss this matter in greater detail or to provide you with any further written information you may require. We look forward to hearing from you and, we would hope, your response could be available as expeditiously as possible.

Thank you for your consideration in this matter.

Very truly yours,

Howard W. Fogt, Jr.
Counsel to the Phosphate Rock
Export Association

Second Letter of Request

July 10, 1986

Dear Ed:

In light of our discussions, Phosrock has decided to revise its April 8, 1986 request for an advisory opinion regarding a broad range of proposed barter and countertrade activities. This letter limits our request, as set forth below, to certain specific activities regarding the Association's efforts to sell phosphate rock to India and The Philippines. Accordingly, we hereby withdraw all aspects of our April 8, 1986 request which sought advice regarding matters other than those described below.

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[15] Under our program, each member will determine individually whether it wishes to participate in any proposed barter transaction and whether it would like to receive its share of the bartered product directly or receive dollars after the Association sells the bartered product in the foreign or domestic marketplace.

[16] We recognize of course that while the proposed barter program will be structured so that the Association does not obtain "market power" in any of the bartered products it receives, the Commission will always reserve its right to take appropriate enforcement action if the program's rules are not followed or otherwise result, for whatever reason, in a substantial lessening of competition in domestic commerce.

[17] Because the proposed barter program would not violate Section 1 of the Sherman Act, it would not run afoul of the Wilson-Tariff Act, 15 U.S.C. 8, either. As Judge Becker held in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1163–64 (E.D. Pa. 1981), "the Wilson-Tariff Act sought to make clear that import trade was subject to the scrutiny of the antitrust laws" and, as such, is coterminous with Section 1 of the Sherman Act. *See also Outboard Marine Corp. v. Petzel*, 461 F.Supp. 384, 407 (D. Del. 1978).

As you know, in order to promote export trade in phosphate rock most efficiently, Phosrock must overcome the inability of Phosrock's actual and potential customers in the developing world to pay cash for phosphate rock and their insistance (sic) on barter and countertrade as, at least, a partial solution to this problem.[1] This issue is particularly important in India and The Philippines, both longtime consumers of large amounts of phosphate rock. More importantly, in both countries, new, significant fertilizer plants are being built. These plants are among the very few new opportunities to enlarge phosphate rock export sale that have come along in recent years. With respect to both the Paradip project in India and the Philphos project in The Philippines, the Association faces intense competition from foreign government owned or controlled phosphate rock suppliers from Morocco, Jordan, Oceania and Israel. Some are competing by offering to take an equity position in the new facility. All are prepared to engage in barter and countertrade, if necessary, to get the business. Nevertheless, there is an opportunity for Phosrock to sell 400/500,000 M/T of phosphate rock per year and realize approximately $15,000,000 in much needed revenues.

In both situations, the Association has been told that barter and countertrade will be important considerations in selecting phosphate rock suppliers. In India, fertilizer imputs (sic) are purchased by the government-owned Minerals and Metals Trading Corporation of India Ltd. ("MMTC"). While preferring to do business on a cash basis, MMTC has recently informally advised that Indian government policy will require that twenty percent of the cost of fertilizer imputs be paid for through barter or countertrade of Indian products. It is understood that this minimum level of barter and countertrade activity may be raised in the near future by the Indian government to fifty percent. Similar incentives to barter phosphate rock exist in The Philippines. In light of the prospects for export trade in phosphate rock to be undertaken on the basis of barter and countertrade, the Association has identified shrimp from India and The Philippines for sale in the United States or elsewhere as an important opportunity for Phosrock to secure a share of this new phosphate rock export business.

There can be no legitimate question that Phosrock's barter or countertrade of phosphate rock for shrimp, under these circumstances, would restrain any domestic trade. The United States is the world's largest consumer of shrimp. American apparent consumption of shrimp increased from 423 million pounds in 1980 to 604 million

[1] *See*, Agrawai, "Countertrade and Bilateral Trade Agreements in Fertilizers" and Tanco, "Countertrade in the Fertilizer Industry," IX *Agro-Chemicals News In Brief* 10 ff (1986), attached hereto as Exhibit A. [Not reproduced herein.]

pounds in 1984.[2] The industry is highly unconcentrated. Much of the shrimp consumed in the United States is imported from many countries around the world. U.S. shrimp imports increased from 219 million pounds in 1980 to 342 million pounds in 1984.[3] The value of 1984 imports was $1.2 billion. The industry is "extremely competitive" with prices in this "highly competitive market . . . adjusting daily to changes in supply and demand."[4]

The barter and countertrade of phosphate rock for shrimp presents (sic) a very practical and natural way for Phosrock to respond to the opportunities presented in India and The Philippines. Such activity would clearly enhance U.S. international trade without any possible legitimate question of restraints on domestic trade in phosphates or shrimp. Indeed, even if Phosrock were to trade shrimp for all of the 500,000 M/T potential of this new phosphate rock business, it would account for only .08% of U.S. value of shrimp imports. No serious antitrust risk can be posed by such activity. Accordingly, the Association requests the Federal Trade Commission, through its advisory opinion, to authorize Phosrock to barter and countertrade phosphate rock for shrimp up to an annual limit of $15,000,000.

As in past barter transactions, the Association would negotiate the exchange of phosphate rock for shrimp. Each member of the Association would determine individually whether it wished to participate in the transaction. Unless in the unlikely event a member requests that it receive shrimp as its share of the consideration for the phosphate rock sold, the Association immediately plans to convert to cash the shrimp received in such transactions through the use of a seafood broker who will have full authority to sell the shrimp at market on terms which it alone will negotiate. Immediately thereafter, the Association will distribute the money obtained from the sale to its members on the basis of each member's proportionate contribution of the exported phosphate rock. We believe these activities to be sustantially similar to the barter activities approved in the Commission's August, 1983 advisory opinion and to constitute "export trade" or "act[s] done in the course of export trade."

Because this matter has been pending since April 8, 1986 and because of its great importance for the Association, we would appreciate your most expeditious consideration of this request.

Sincerely yours,

Howard W. Fogt, Jr.
Counsel for the Phosphate Rock
Export Association

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[2] United States International Trade Commission, "Conditions of Competition Affecting the U.S. Gulf and South Atlantic Shrimp Industry," Report No. 332–201, p.143 (1985).

[3] *Id.* at 153. *See* Table 61 attached as Exhibit B. [Not reproduced herein.]

[4] *Id.* at iii and 188.

TABLE OF COMMODITIES*

DECISIONS AND ORDERS

Page

Automobile advertising 193, 243, 249
Automotive fluids 123

Carpet cleaning fluid 41
Chemicals 33
Cosmetics 135

Duty-cyclers 148

Energy controlling devices 6
Exterminating services 263

Footwear products 133

Grocery stores 174

Insurance agents 87, 93, 99

Lettuce 40

Mobile telephones 158

Optometrists 25

Podiatrists 116
Powdered milk products 18

Railroad signaling equipment 181
Record companies 105, 112

Tax preparation services 168
Telephones 255

Ultrasonic pest control devices 62

Watch repair 1
Weight reducing products 56
Welding 184
Wheat germ oil products 385

*Commodities involved in dismissing or vacating orders are *italicized*.

INDEX*

DECISIONS AND ORDERS

Page

Acquiring Corporate Stock or Assets:
Acquiring corporate stock or assets—
Federal Trade Commission Act 51, 105, 112
Arrangements, connections, dealings, etc. 105, 112
Joint ventures 105, 112
Advertising Falsely or Misleadingly:
Advertising falsely or misleadingly 6, 41, 62, 123, 148, 158, 255
Business status, advantages or connections 18
Advertising and promotional services 135
Business methods and policies 135
Endorsement 123
Comparative data or merits 62
Earnings and profits 18
Promotional sales plans 135
Qualities or properties of product or service 41, 123, 158, 255
Economizing or saving 6, 148
Insecticidal or repellent 62
Medicinal, therapeutic, healthful, etc. 18, 385
Rodenticidal 62
Results 6, 62, 148, 158
Scientific or other relevant facts 6, 41, 62, 148, 158, 255
Scientific tests 148
Aiding, Assisting and Abetting Unfair or Unlawful Act or Practice:
Aiding, assisting and abetting unfair or unlawful act or practice 87, 93, 99
Claiming or Using Endorsements or Testimonials Falsely or Misleadingly:
Claiming or using endorsements or testimonials falsely or misleadingly ... 123
Coercing and Intimidating:
Competitors 193, 243, 249
Employees of competitors 174
Members 1, 87, 93, 99, 116, 193, 243, 249
Suppliers and sellers 25
Combining or Conspiring:
Combining or conspiring 1, 25, 33, 87, 93, 99, 116, 174, 193, 243, 249
To control allocations and solicitation of customers 193, 243, 249
To control employment practices 116, 193, 243, 249

* Pertaining to prohibited trade practices and affirmative corrective actions involved in Commission decisions and orders, as codified in 16 CFR Part 13.

Page

To control marketing practices and conditions 25, 174, 193, 243, 249
To discriminate unfairly or restrictively in general 87, 93, 99
To fix prices 1, 33
To restrict competition in buying 25, 174
Corrective Actions and/or Requirements:
Corrective actions and/or requirements 105, 112
Disclosures 1, 25, 33, 41, 62, 116, 135, 174, 255, 263
Displays, in-house 174
Maintain records 1, 25, 33, 41, 62, 116, 123, 193, 243, 249, 263
Advertising substantiation 6, 18, 148, 158, 255, 385
Maintain means of communication 193, 243, 249
Refunds, rebates and/or credits 62
Release of general, specific, or contractual constrictions, requirements, or restraints 263
Cutting Off Access to Customers or Market:
Interfering with advertising mediums 193, 243, 249
Interfering with competitors' bids or price quotations 193, 243, 249
Cutting Off Supplies or Service:
Threatening disciplinary action or otherwise 25, 116
Discriminating in Price Under Section 5, Federal Trade Commission Act:
Charges and prices 263
Disseminating Advertisements, Etc.:
Disseminating advertisements, etc. 193, 243, 249
Furnishing False Guaranties:
Furnishing false guaranties 263
Misrepresenting Oneself and Goods:
—Goods:
Comparative data or merits 62
Earnings and profits 18
Endorsements 123
Qualities or properties 6, 62, 123, 148, 158, 255, 385
Results 6, 62, 148, 158
Scientific or other relevant facts 6, 62, 148, 158, 255
Tests, purported 123
Modified Orders: 56, 133, 168, 181, 184
Neglecting, Unfairly or Deceptively, To Make Material Disclosure:
Qualities or properties 62
Scientific or other relevant facts 62
Opinions, Statements By Commissioners 135, 184, 263
Set Aside Order 40
Unfair Methods or Practices, etc., Involved in this Volume:
Acquiring Corporate Stock or Assets
Advertising Falsely or Misleadingly
Aiding, Assisting and Abetting Unfair or Unlawful Act or Practice

Claiming or Using Endorsements or Testimonials Falsely or Misleadingly
Coercing and Intimidating
Combining or Conspiring
Corrective Actions and/or Requirements
Cutting Off Access to Customers or Market
Cutting Off Supplies or Service
Discriminating in Price Under Sec. 5, FTC Act
Furnishing False Guaranties
Misrepresenting Oneself and Goods
—Goods
Neglecting, Unfairly or Deceptively, To Make Material Disclosure

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